No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JESSE L. COOK,

Petitioner,

v.

CHRYSLER CORPORATION and

UNITED AUTOMOBILE AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS LOCAL 136,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
Suite 201, 4545 42nd St., NW
Washington, DC 20016
(202) 363-1773

ROBERT W. NIXON
MITCHELL A. TYNER
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6320

MICHAEL J. HOARE
One Metropolitan Square
24th Floor
St. Louis, MO 63102
(314) 241-7961

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether non-seniority provisions, such as a uniform attendance requirement and procedure, contained in a collective bargaining agreement, limit the scope of the reasonable accommodation duty imposed upon employers by section 701(j) of Title VII of the Civil Rights Act of 1964, which has resulted in a conflict among the circuits.

2. Whether the mere existence of a nondiscriminatory collective bargaining agreement containing a nondiscriminatory seniority system (or the existence of some other arrangement providing a general means to assist with employee scheduling) may by be deemed a substitute for the active effort by the employer to seek a reasonable accommodation of an employee's religious practices.

3. Whether, in determining if each available accommodation would result in more than a de minimis cost to the employer, the Court should consider the EEOC Guidelines on Religious Discrimination and whether the trial court, in making its findings, should have quantified the claimed monetary costs and loss of efficiency and further should have considered at least the following factors: (a) the size, operating costs, and number of employees needing accommodation; and (b) whether the additional expenses, if any, incurred were for costs similar to the regular payment of premium wages of substitutes.

4. Whether an employer violates Title VII and this Court's teachings in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), when it refuses to use the same accommodation means for one employee that it uses for all other employees who seek accommodation for religious or secular purposes.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Jesse Cook, the petitioner, and Chrysler Corporation and United Automobile Aerospace, Agricultural Implement Workers Local 136, the respondents.

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Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

Jesse Cook petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit. The opinion and judgment of the court of appeals was entered in this case on December 7, 1992. The Petition for Rehearing and Suggestions for Rehearing En Banc was denied on January 21, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 981 F.2d 336 (8th Cir. 1992), and is reprinted in the Appendix herein at p. 1a, *infra*.

The memorandum opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, which was entered on December 31, 1991, is reported at 779 F. Supp. 1016 (E.D. Mo. 1991), and is reprinted in the Appendix herein at p. 10a, *infra*.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (general federal question jurisdiction), the petitioner brought this suit in the United States District Court for the Eastern District of Missouri, Eastern Division. On December 31, 1991, the district court entered judgment in favor of the defendants Chrysler and the union and against plaintiff Cook on the merits of plaintiff's complaint. *See* pp. 10a-26a, *infra*.

On petitioner's appeal, the Eighth Circuit on December 7, 1992, entered a judgment and order affirming the district court's judgment. *See* p. 8a, *infra*. Thereafter a timely petition for rehearing and suggestions for rehearing en banc was filed with the court of appeals. The court of appeals on January 21, 1993, entered an order denying the petition for rehearing and suggestions for rehearing en banc. *See* p. 9a, *infra*.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or

practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(c) provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or an applicant for em-

> ployment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,. . .

STATEMENT OF THE CASE

Three days after notifying Chrysler of his need for a religious accommodation because his work schedule required work during his Sabbath, petitioner Cook was told by his immediate supervisor that no accommodation could be made (A 154, 204-07, 225-26) and his Friday night absences would not be excused (A 446-47). Chrysler supervision was not only instructed by its Labor Relations Department to refuse Friday night absences for Cook for religious reasons but also told not even to contact labor relations again with such a request (A 1197).

Cook was thereafter scheduled to work on Friday nights and warned that if he left early he would be considered a voluntary quit (A 208, 449, 610, 614, 615; *see also* A 618-21, 705-06). Roger Williams, another Sabbatarian employed at the plant who consistently left early on Friday nights, however, was never considered a voluntary quit. It was not Chrysler's practice to consider an employee as a voluntary quit when he or she left early but only in violation of the rules of good conduct (A 1202-03).

On May 6, 1986, Cook's area manager met with Cook and gave him a "supervisor's report." (A 132, 215, 415-16) The report stated:

> On Friday, 2/28/86, employee J. L. Cook was absent and subsequently was issued a Step 2 of the Uniform Attendance Procedure for such absences.
>
> Notwithstanding the receipt of a letter dated January 16, 1986, from the St. Louis Central Seventh-day Adventist Church, requesting the Corporation's consideration of Cook's religious preferences and to accommodate his absences on Friday nights or Saturdays, Management has reviewed the entire facts and circumstances surrounding this request and is unable to make such accommodation. Specifically, employee Cook's seniority date is 1/14/86 and he cannot be transferred to the first shift by virtue of the Collective Bargaining Agreement which only recognizes seniority as the basis for its shift preference. Employee Cook does not have sufficient seniority to be transferred to the first shift.
>
> This report is to advise employee Cook that any further absences will be considered in the same manner as any other absence.

Cook was told that future absences for religious reasons would not be excused. If he continued to be absent, he would progress through the Uniform Attendance Procedure, which was set out in the collective bargaining agreement, and would ultimately be discharged (A 247-48, 697-700, 1233-48).

Cook continued to be absent on Friday nights. Chrysler imposed progressive discipline consisting of mandatory time off without pay (A 176-78). Although absentee conferences were held at each discipline step, Chrysler failed to discuss the possibility of accommodating Cook's religious beliefs (A 211-13; *see also* A 668-90, 698-700). When Cook reached

the final step of the absentee program, Chrysler and a union representative informed him he was fired (A 159).

In spite of an earlier Eighth Circuit ruling in *Huston v. Local No. 93, Int'l Union, UAW*, 559 F.2d 477 (8th Cir. 1977), which held that a union was not obligated to consent to a shift change accommodation in violation of the seniority provisions of a collective bargaining agreement, that was the sole method of accommodation Chrysler chose to consider. Chrysler's labor relations manager testified that he knew in advance that the union was not going to agree to such an accommodation and that his request of the union was merely to put the onus of non-accommodation on the union (Kallaos Dep. at 151-53).

Cook's area manager specifically acknowledged that Cook was not terminated because of any production loss and in fact had no knowledge of any loss as a result of Cook's Friday night absences (A 1255). The representative from labor relations testified similarly (A 1050-51).

Although Chrysler maintained and the district court found that there were additional "repairs" when Cook was not on the job, his immediate supervisor testified that these repairs only occurred in Cook's absences when the regular floater was not on the job and the "floater was more than qualified to do the job."[1] (A 625; *see also* A 627, 628, 629, and 630). In fact, even a temporary part-time worker ("TPT") could have handled the job on a regular basis (A 667).

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[1] The term "repairs" is misleading. It was Cook's job to install the spare tire and jack in the automobile trunk (A 21). Cook's foreman testified that it took about three days to learn the job (A 627, 667-68). A "repair" on the line might be something as insignificant as a misplaced spare tire and repairs relating to Cook's job took approximately one minute (A 652). It was regular practice to have two repairmen at the end of the line along with the inspectors (A 652-53). Cook's foreman said that if there were no repairs, these repairmen would still be standing around getting paid (A 422).

Although there is absolutely no proof of any production loss as a result of Cook's Friday night absences, Chrysler failed to investigate whether there were other line jobs to which Cook could have been assigned to make it easier to accommodate him. Cook's foreman acknowledged that there were "probably a lot of jobs" but did not look into them (A 639-40).[2] Cook's supervisor never consulted with the union to find out whether it would be willing for Cook to transfer to a different position on the line where it might be easier to cover for him on Friday night nor did he ever investigate to ascertain whether there were any other sections within Cook's department that might have a job that would be easier to cover. Likewise, there was no investigation to find out whether there were any positions outside of Cook's department on the same shift where there might have been available jobs (A 452). At no time was there any inquiry by Cook's supervisors as to whether replacements could be scheduled regularly on Friday nights so that they could learn Cook's job and cover for him. It was acknowledged that if this had been done, it would have been much easier to have accommodated Cook (A 453).

There is absolutely no evidence that Chrysler was required to hire an additional employee because of Cook's absences (A 816-19). In fact, the record is devoid of any evidence that during the nine months Cook refrained from working on Friday nights or arrived late Saturday nights that any additional costs were incurred (A 525-56, 1255-56). Cook was not paid for his absences. Floaters were paid the same as Cook, and TPTs (Temporary Part Time employees) were paid less. Floaters were part of the pool to cover absences and were paid benefits regardless of when they worked. And TPTs did not receive any benefits so long as they remained temporary, i.e., under 120 days.

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[2] Cook's immediate supervisor testified that Cook was not transferred because a regular "floater" could handle the job without repairs (A 631, 641, 707).

The representative from labor relations who was primarily involved in disciplining and ultimately terminating Cook testified that he believed that there was no loss in production as a result of Cook not working on Friday night and that he had never attempted to quantify or determine if there was any loss (A 1050-51). The area manager acknowledged that there were other employees absent from work on nights other than Friday. When employees were absent, Chrysler covered their position exactly the same way that Cook's absences were covered (A 1255-56). In fact, on the line on which Cook worked prior to his discharge, floaters or TPTs routinely replaced absent employees (A 428; 450-51).

There was never any report received that Cook's position was not covered on Friday night when Cook was absent (A 418-19). Although the area manager confirmed that there were in fact records kept daily of hourly production losses, he had no recollection of anyone trying to determine any loss resulting from Cook's Friday night absences (A 1255-56).

A representative of the Seventh-day Adventist Church wrote to the labor relations department of Chrysler stating that Cook would be willing to work on Friday afternoons and evenings up to his Sabbath hours (Cook worked after sundown Saturday) and that he was willing to cooperate with any accommodation efforts made on his behalf so long as it did not violate his religious beliefs. The letter suggested the utilization of "floaters" that Chrysler hired to handle absences (A 133-34).

Chrysler never explored with the union whether it would accept Cook's suggestion (A 544-48) because, even if the union did not object, it violated Chrysler's attendance criteria (A 1025-26). The head of labor relations, however, admitted such an arrangement would make it easier to cover for Cook since it would permit Chrysler to plan ahead (A 548-50). The union had no objection to utilizing

absentee replacements for Cook on Friday nights (A 858-59). In fact, the union specifically asked Chrysler to accommodate Cook by allowing him off on Friday nights, utilizing the absentee pool, and permitting him to use the paid absence allowance. This was the same proposal made by Cook's church representative (A 156, 938-43).

In the four months between May 6, 1986, when the supervisor's report was presented to Cook stating that no excused absences would be permitted for religious reasons until September 18, 1986, when Cook was discharged, other than holding a single meeting with and taking telephone calls from Cook's church representative, Chrysler did nothing to resolve Cook's problem and made no further investigation concerning a possible accommodation (A 1104-05; *see also* A 328, 1199-1200). Chrysler's position was simply that Cook's refusal to work, although motivated by religious convictions, was an act of misconduct requiring discipline (A 998-99).

Several aspects of the district court's memorandum opinion require emphasis. The court found that the "[t]he national agreement . . . sets forth a no-fault absenteeism policy, known as the Uniform Attendance Procedure. *Cook*, 779 F. Supp. at 1018; *see* p. 12a, *infra*. In its conclusions of law, the court also stated that "[e]xcusing Cook every Friday night would circumvent the 'book procedure' specifically set up to afford everyone equal opportunity to arrange absences." *Id.* at 1023; *see* p. 21a, *infra*. And "[c]onstant Friday night absences would also conflict with the chronic absenteeism policy." *Id.* The court then held that "[c]ircumventing the book procedure and the chronic absenteeism policy would violate the local agreement and supersede the contractual rights of Cook's fellow workers. *Id.*

The district court found that "[t]he collective bargaining agreements were a maze of restrictions" and that "[e]verywhere he [Kallaos] turned he ran into a 'violation'

wall." *Id.* at 1024; *see* p. 24a, *infra*. The court concluded that Chrysler was unable to accommodate Cook not simply because of his lack of seniority but because of the existence of the collective bargaining agreements. *Id.* at 1025; *see* p. 25a, *infra*. However, the lower court at the same time stated that Chrysler and the union had "provided a seniority system, which in itself, represented a significant accommodation to the needs, religious and secular, of all employees." *Id.*; *see* p. 25a, *infra*.

In the trial court and the court of appeals petitioner Cook specifically raised each of the issues here presented. These issues included the questions as to whether only the seniority, as distinguished from all of the collective bargaining provisions, stand as a legal roadblock to the statutory accommodation mandate. Cook also challenged the district court's claim that the collective bargaining agreement itself represented an employee accommodation. The court of appeals, however, concluded that a collective bargaining agreement and other employer-designed arrangements, which provided methods by which employees could generally obtain days off, met the accommodation requirement imposed by Title VII. *Cook*, 981 F.2d at 339; *see* p. 5a, *infra*.

Although the district court never quantified the dollar cost nor the extent of inefficiency, which the court concluded would have resulted from accommodating Cook, the court of appeals held that "there is evidence to support the district court's finding that more than *de minimis* cost was involved." *Id.* This holding was made even though the trial court had included as part of its recitation of claimed "costs," employee benefits which were clearly not similar to the regular payment of premium wages of substitutes which was as issue in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). The trial court had also failed to consider the claimed costs in relation to the size and operating costs of Chrysler and the number of individuals who would

in fact need a particular accommodation at Chrysler Plant No. 2.

The court of appeals held that "[t]he collective bargaining agreement provides both a system for determining seniority and an absenteeism policy." *Cook*, 981 F.2d at 338; *see* 4a, *infra*. It stated that "[e]fforts to accommodate Cook would violate the terms of the collective bargaining agreement and contravene the 'book' procedures." *Id.* The appeals court concluded that "Chrysler's efforts satisfied the requirements of Title VII in view of the obstacles presented by the collective bargaining agreement. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 83 n.14." *Cook*, 981 F.2d at 339; *see* p. 4a-5a, *infra*.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE CONCLUSION OF LAW OF THE COURTS BELOW, NON-SENIORITY PROVISIONS CONTAINED IN A COLLECTIVE BARGAINING AGREEMENT DO NOT LIMIT THE SCOPE OF THE REASONABLE ACCOMMODATION REQUIREMENT IMPOSED ON EMPLOYERS BY SECTION 701(j) OF TITLE VII.

The conclusion of law of the district court, reaffirmed by the court of appeals, that all provisions contained in a collective bargaining agreement are inviolate even against the religious accommodation requirements of Title VII, in essence rewrites congressional legislation and effectively confers on employers and unions operating with a collective bargaining agreement the ability to excuse themselves from accommodating the religious beliefs and practices of employees.

Religious accommodation law is in a state of disarray with Title VII offering only empty promises and expensive litigation to Sabbatarians who find themselves working in union shops. For over 15 years since the decision by this Court in *Trans World Airlines v. Hardison*, 432 U.S. 63

(1977), lower "[c]ourts have reached varying conclusions on the degree of accommodation required if the proposed accommodation would vary the terms of an established bargaining agreement." Schlei & Grossman, *Employment Discrimination Law*, (2d ed. Cumulative Supp. 1983-85). Courts of appeal have split as to whether *Hardison* held that only seniority provisions contained in collective bargaining agreements were impervious to Title VII religious accommodation requirements or whether all provisions of a bona fide collective bargaining agreement constituted a bar to an employee's accommodation request. Other courts have given divergent definitions as to what is a "seniority" provision. Some give an expansive, and others a more restricted, definition to the term. As a result, the rights of employees and the duties of employers and unions under the religious accommodation requirements of Title VII expand or contract depending upon the district or circuit in which the litigation occurs.

In some circuits, such as the Eighth Circuit, a unionized employer can use a collective bargaining agreement as almost an absolute shield against any duty of religious accommodation. In other circuits, the employer must demonstrate that a specific seniority provision would be violated if a specific accommodation arrangement were to be employed.

The Eighth Circuit's deference to all provisions contained in a collective bargaining agreement surfaced prior to this decision. That court in a per curiam opinion in *Rohr v. Western Elec. Co., Inc.*, 567 F.2d 829 (8th Cir. 1977), in dealing with a religious observer who offered to work a four-day week or on Sunday when attempts to reschedule him failed, found that "the collective bargaining agreement prohibited Western Electric from authorizing nonstandard workweeks." *Id.* at 830.

The Eighth Circuit, in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979), reviewing this Court's de-

cision in *Hardison*, concluded that "[s]ection 703(a)(1) . . . requires an employer to accommodate the religious observance of its employees unless such accommodation would contravene the provisions of a valid collective bargaining agreement or would cause the employer undue hardship." *Id.* at 958. The *Brown* court, in stating the issue it was to decide in that case, said that "[s]ince neither party contends that such an arrangement would contravene the collective bargaining agreement, the only remaining inquiry is whether the cost of the proposed accommodation would be more than de minimis." *Id.*

In light of the decision in this case, it is clear that the absence of an employer claim that the proposed accommodation (permitting the Sabbath observer to work a four-day week with the fifth day being covered through a replacement pool) violated the union contract was critical and explains the difference in results between *Brown* and *Cook*.

In *Hardison*, this Court noted that both the plaintiff and EEOC insisted "that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and seniority rights of TWA's other employees." *Trans World Airlines v. Hardison*, 432 U.S. at 79. This Court then found:

> We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that

> an agreed-upon seniority system must give way when necessary to accommodate religious observances.

Id.

This Court further explained:

> Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself. Section 703(h) provides in pertinent part:
>
> > "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(h).

Id. at 81-82.

After analyzing the impact of section 703(h), the Court then stated that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.*

The court of appeals in *Cook* plucked one snippet of this Court's analysis in *Hardison* and concluded that "the duty to accommodate does not require an employer to take steps inconsistent with an otherwise valid agreement." *Cook*, 981 F.2d at 338; *see* 4a, *infra*. This analysis below resulted in a determination that the uniform attendance procedure contained in the collective bargaining agreements were inviolate and stood as an impenetrable shield against Cook's accommodation claim.

In *Getz v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 802 F.2d 72, 74 (3d Cir. 1986), the court found that an accommodation was not required if it violated an overtime provision of a collective bargaining provision. The court cited its earlier decision in *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986), in which it concluded that "[i]n its central holding [in *Trans World Airlines, Inc. v. Hardison*] the Court ruled that the reasonable accommodation requirement did not compel an employer to abrogate a collective bargaining agreement in order to enable an employee to satisfy religious observances."

The majority of the religious accommodation decisions in other circuits, however, have concluded that this Court's decision in *Hardison* relates specifically to seniority provisions and not to the remaining provisions of a collective bargaining agreement. The court in *McDaniel v. Essex Int'l Inc.*, 696 F.2d 34, 37 (6th Cir. 1982), recognized that the *Hardison* Court's deference to terms of the collective bargaining agreement was limited to seniority rights. It ruled that Title VII required the union to waive the union security clause in its contract in order to accommodate the plaintiff. Every circuit that has ruled on this issue has ruled the same way. *See Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom International Ass'n of Machinists and Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977); *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981)[3] *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

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[3] In *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 452 (7th Cir. 1981), the court stated that "[i]t is well settled, . . . that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations."

Some courts have concluded that even if there were any validity to a claim that a union contract presented an obstacle to alternative means of accommodation, the employer is still under the obligation to seek the union's consent to a variance. *See Shaffield v. Northrop Worldwide Aircraft Serv., Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974). Other courts, however, differ with the view expressed in *Shaffield*. For instance, in *Meadows v. Golden Grain Macaroni Co.*, 45 FEP Cases 235 (N.D. Ill. 1987), the court concluded that granting a leave of absence to an employee to permit that employee to accrue seniority while not working would be inconsistent with a bona fide seniority system and thus not a reasonable accommodation. *Id.* at 243.

This Court should clearly state whether the Third and Eighth Circuit decisions based on *Hardison*—or those of the Fifth, Sixth, Seventh, and Ninth—are correct. Leaving *Cook* to stand will only continue to bring confusion to this area of Title VII law and will essentially emasculate the protections of Title VII at least when collective bargaining agreements factor into the equation.

II. CONTRARY TO THE HOLDINGS OF THE COURTS BELOW, THE EXISTENCE OF A COLLECTIVE BARGAINING AGREEMENT OR OTHER EMPLOYER ARRANGEMENT PROVIDING SOME FLEXIBILITY TO ASSIST EMPLOYEES GENERALLY AS TO SCHEDULING MAY NOT BE DEEMED A SUBSTITUTE FOR THE ACTIVE EFFORT OF AN EMPLOYER TO SEEK A MEANS BY WHICH AN EMPLOYEE CAN BE REASONABLY ACCOMMODATED.

The court of appeals, citing an earlier decision [*Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671 (8th Cir. 1985)], held that "the collective bargaining agreement, coupled with the 'book' method for obtaining days off, in itself provided an accommodation of Cook's religious needs."

Cook, 981 F.2d at 339; *see* p. 5a, *infra*.[4] It is true that this Court in *Hardison* stated:

> We shall say more about the seniority system, but at this juncture it appears to us that the system itself represents a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off.

Trans World Airlines v. Hardison, 432 U.S. at 78. Seizing upon this language, the circuit court here concluded that a collective bargaining agreement may suffice and replace hands-on involvement of management in attempting to work out an employee's need for a religious accommodation. If that is this Court's holding, then the Court has effectively overruled the legislative intent of Congress.

Such a holding is in contrast to the recent holding of the Fourth Circuit in *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116 (4th Cir. 1988). In that case, the court noted that the employer had "demonstrate[d] an effort to accommodate *all* their employees when Sunday work was assigned." Nevertheless, the court concluded that "[t]hese accommodations, . . . were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs." The court observed that Ithaca had made no efforts to utilize methods suggested by the EEOC Guidelines, 29 C.F.R. § 1605.2(d)(1)(i), and therefore concluded that the employer violated Title VII by discriminating against the plaintiff. *Id.* at 119.

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[4] In *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 674 (8th Cir. 1985), the court concluded that a collective bargaining agreement in and of itself could be deemed a sufficient accommodation to meet Title VII requirements.

The decision in *Cook* cannot be squared with the decision in *Ithaca*. Clearly, the two circuits have substantially differing views as to whether or not an employer must actually engage in an active effort to search out an accommodation for its employees. The Fourth Circuit has concluded that it must. The Eighth Circuit in *Cook* has clearly indicated that it need not. A clear implication of the decision in *Cook* is that the mere existence of a collective bargaining agreement constitutes sufficient employer accommodation, thus excusing the employer from any active responsibility as to accommodation.[5]

This concept did not originate in *Cook*. The Ninth Circuit in *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 267 (9th Cir. 1988), held that an employer meets its duty to seek a reasonable accommodation of an employee's religious needs by informing her of "her options under the collective bargaining agreement." In *Hudson*, the court found that "the bases for accommodation contained in the collective bargaining agreement are recognized as *reasonable means of satisfying* an employer's burden under Title VII." *Id.* at 226 (emphasis supplied).

The Ninth Circuit skirted the question of whether the terms of the collective bargaining agreement did in fact provide a means of accommodating the employee's religious needs at all, rather than simply the potential means to accommodate. Exactly the same has occurred here. The court does not and cannot show that the provisions existing in the collective bargaining agreement would have

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[5] The circuit court decision in *Cook* is internally inconsistent. Although it states that the collective bargaining agreement provided a means of accommodation, it simultaneously concluded that the collective bargaining agreement was "a maze of restrictions" preventing Chrysler from accommodating Cook's religious beliefs and practices as to Sabbath observance. However, a collective bargaining agreement must be sufficiently flexible to permit religious accommodations required by Title VII. *See EEOC v. University of Detroit*, 904 F.2d 331, 334-35 (6th Cir. 1990).

permitted Cook to self-accommodate. The holding in *Hudson* and implicitly the holding in *Cook* fail to distinguish between a system of potential accommodation and an actual accommodation.

Contrary to the reasonings of the Eighth and Ninth Circuits, the Sixth Circuit Court of Appeals specifically held in *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), that a collective bargaining agreement's provision permitting religious observers to swap days off with other employees did not, in the case of the employee who had a religious objection to seeking such a swap, provide that employee with a reasonable accommodation.

We believe that *Cook* and the other cases, which hold that a nondiscriminatory collective bargaining agreement by itself may constitute a reasonable accommodation, clearly misinterpret *Hardison*. While this Court in *Hardison* did determine that TWA made a reasonable effort to accommodate and that other suggested alternatives would constitute an undue hardship within the meaning of the statute, this Court so ruled *only* after thoroughly and extensively discussing the detailed findings of the district court. *See Hardison*, 432 U.S. at 77.

The trial and appellate courts below failed to support their conclusion that the collective bargaining agreement did in fact provide a reasonable accommodation.[6] Title VII rights are distinct from those secured by a collective bargaining agreement. Chrysler cannot, in essence, claim that

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[6] Even if a collective bargaining agreement could be considered as a substitute for active effort to accommodate, the Court would have to first determine whether it "eliminates the conflict between employment requirements and religious practices." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986). The courts below failed to address this question and hence failed to make the needed finding that the scheduling or other provisions of the collective bargaining agreement or the "book" procedure would have in fact eliminated the conflict between Cook's employment requirements and his religious practices.

by entering into the collective bargaining agreement, it has effected a prospective waiver of Title VII protection. Justice Powell stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), that Title VII rights are not susceptible to prospective waiver. *See also Nottelson v. A.O. Smith Corp.*, 423 F. Supp. 1345, 1348 (E.D. Wis. 1976).

The legislative history of the reasonable accommodation language of this statute clearly indicates that Congress was concerned with cases such as this, which involve a "refusal at times of employers to hire or continue in employment of employees whose religious practices rigidly require them to abstain from work . . . on particular holidays." 18 Cong. Rec. 705-06 (1972) (statement of Sen. Jennings Randolph).

This Court in *Ansonia*, 479 U.S. at 70 observed:

> In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual *additional opportunity* to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs. [Emphasis supplied.]

If collective bargaining agreements in and of themselves represent religious accommodation, Title VII changed nothing. It is clear that when Congress adopted section 701(j), it did not believe that such agreements served that purpose. If it had, it surely would not have enacted the amendment. Thus, the employer is required to take some good faith steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405-06 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989); *McDaniel v. Essex Int'l Inc.*, 571 F.2d 338, 343 (6th Cir. 1978).

Through the enactment of section 701(j), Congress placed the burden on the employer to engage in active and bona

fide efforts to accommodate the religious needs of its employees and if unsuccessful, then to demonstrate that it was unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. *Lake v. B.F. Goodrich Co.*, 837 F.2d 449, 451 (11th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988).

III. THE COURT FAILED TO PROPERLY ANALYZE THE ISSUE OF UNDUE HARDSHIP WHEN DETERMINING THAT EACH AVAILABLE ACCOMMODATION WOULD RESULT IN "MORE THAN A DE MINIMIS COST" TO THE EMPLOYER AND IS INCONSISTENT WITH EEOC GUIDANCE.

The court of appeals concluded that it could not upset the district court's finding that accommodating Cook would result in more than a de minimis cost to Chrysler.[7] Both the court of appeals and the district court, however, have applied the de minimis cost analysis in a manner inconsistent with the EEOC Guidelines on Religious Discrimination.

The district court failed to quantify and identify each of the claimed costs for each type of accommodation and also concluded that the cost was more than de minimis when it involved such items as hospital and other benefits to which workers at Chrysler were entitled.

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[7] In *Gordon v. MCI Telecommunications Corp.*, 791 F. Supp. 431, 435 (S.D. N.Y. 1992), the district court noted that "[a]lthough the term 'undue hardship' is not defined in Title VII, the Supreme Court has held that an accommodation that results in an imposition on other workers or requires an employer to bear more than *de minimis* costs in terms of money or efficiency creates an undue hardship." Perhaps the phrase "more than de minimis cost" means a cost which would result in "substantial economic burdens" in light of the Court's more recent holding in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985), which raised the same Establishment Clause concerns as those raised by the appellants in *Hardison*.

EEOC found that after *Hardison* "[t]he Court's interpretation of an undue hardship led to much confusion in the employment sector. It left employers, employees, and labor organizations unclear as to the extent of the statutory duty under Title VII to provide reasonable accommodation for the religious practices of an employee or prospective employee." 45 Fed. Reg. 72610 (1980) (providing background on the EEOC Guidelines on Discrimination Because of Religion).

The legislative history surrounding the adoption of section 701(j) as an amendment to Title VII indicates that "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals*, 429 F.2d 324 (1970). . . ." *Cooper v. General Dynamics*, 533 F.2d at 168 n.9, quoting 18 Cong. Rec. 1861-1862 (1972).

After holding post-*Hardison* hearings, EEOC issued new Guidelines on Discrimination Because of Religion. These Guidelines are set forth in 29 C.F.R. §§ 1605.1-1605.3, 45 Fed. Reg. 72610-72615; *see* p. 27a, *infra*. The court of appeals below, however, ignored these Guidelines in analyzing Chrysler's undue hardship defense, particularly as it relates to the application of the "more than de minimis cost" criteria. This Court should provide guidance as to whether the Eighth Circuit or the EEOC Guidelines represents the present state of the law concerning the issue of undue hardship in religious accommodation cases.

The EEOC Guidelines, in discussing undue hardship, states that "[t]he Commission will determine what constitutes 'more than a *de minimis* cost' with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." 29 C.F.R. § 1605.2(e)(1), 45 Fed. Reg. 72613-14 (1980); *see* p. 32a, *infra*.

The same Guidelines also states that the "*de minimis* cost" phrase as it was used in *Hardison* would be construed "to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*," would constitute undue hardship. *Id.* at 72614; *see* p. 32a, *infra*.

The Guidelines further states that it "will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation." *Id.; see id.*

The court in *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 259 (N.D. Ill. 1983), citing the EEOC Guidelines, stated that "[u]ltimately, the question whether defendants have imposed an undue burden on employees . . ., or whether the burden is de minimis, is a question of fact that will depend on a variety of factors. . . ."

Recently, the Tenth Circuit in *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989), citing *Tooley v. Martin-Marietta Corp.*, 648 F.2d at 1243, stated that "[t]he *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case." Chrysler introduced no quantifiable evidence as to the magnitude of hardship. The district court made no finding as to the magnitude, and the court of appeals never discussed the matter. The Eighth Circuit in fact held that the additional costs need not be quantifiable. *Cook*, 981 F.2d at 339; *see* p. 6a, *infra*. When the trial court fails to quantify what it believes to be more than de minimis costs, it is impossible for a reviewing court to determine whether the finding was or was not clearly erroneous.

Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973), postulated that "[a]s the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation de-

creases." The lower courts need further guidance from this Court as to how to apply the de minimis costs analysis—that is whether total dollars alone are sufficient or whether consistent with the case-by-case application of the undue hardship test, the various factors such as the size of the employer, the method of filling vacancies for vacations and other absences, and other factors must all be analyzed.

What is more than de minimis cost of course is a judicial determination that must be made on a case-by-case basis. But unless further guidance is provided as to the application of the de minimis cost test, and trial courts are required to quantify that cost, the test will be applied unevenly.[8] The ultimate result will be less resolution at conciliation and more litigation.

IV. TITLE VII IS VIOLATED WHEN AN EMPLOYER UTILIZES A SPECIFIC MEANS OF ACCOMMODATING OTHER EMPLOYEES FOR EITHER RELIGIOUS OR SECULAR PURPOSES BUT DOES NOT PERMIT ANOTHER EMPLOYEE SEEKING A RELIGIOUS ACCOMMODATION TO BE ACCOMMODATED IN THE SAME MANNER.

Cook was denied an accommodation that another Sabbatarian (with a different supervisor) in the same plant

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[8] The court of appeals in *Cook* cited *Lake v. B.F. Goodrich*, 837 F.2d 449 (11th Cir. 1988), in support of its holding that the circuit court will upset findings of undue hardship and more than de minimis costs only if clearly erroneous. It is significant that both in *Cook* and in *Lake* the courts of appeal observed that though they might have reached another conclusion since there was evidence to support the district court's findings, the conclusions could not be found to be clearly erroneous. A reading of the district courts' decisions in both cases reveals why guidance from this Court concerning the issues raised in this petition are vital to a more uniform application of the religious accommodation provisions of Title VII. Had *Cook* been decided by the court in Alabama and *Lake* by the court in Missouri, the decisions in both cases might easily have been the opposite. Fifteen years is sufficient time for the lower courts to have squared their reasoning with one another. Action by this Court is needed now.

was afforded. Chrysler also refused to excuse Cook's absences because his religious reasons were not deemed as important as the secular reasons of other employees. The district court ignored the fact that Chrysler itself devised specific methods to provide replacements for absent workers. These methods included "absentee pool" (floaters), "temporary part-time" people (TPTs), and "vacation replacements." The collective bargaining contract also contains numerous provisions permitting employees to be excused from work for secular reasons. These absences may be for vacations (A 69), leave for union business (A 70), leave for bereavement (A 70), leave for jury duty (A 70-71), leave for short-term military duty (A 71-72). The agreement also excuses short-term military or National Guard duty not to exceed 30 calendar days (A 71). Most important, Chrysler gives its supervisors discretion to excuse an employee (A 782). The only standing order against providing an excused absence was contained in Chrysler's May 8 supervisor's report prohibiting excused absences for religious reasons (*see* A 132, 215, 415-16, 293-94).

Roger Williams, the other Sabbatarian employed at Chrysler Plant No. 2, was informed by his supervisor that if he kept his attendance up, Chrysler would allow him to be off at sunset so that he could observe his Sabbath so long as he came into work after sunset on Saturday. That arrangement continued until May 8, 1986, when Chrysler notified Cook that he would not be excused from work on Friday nights (A 293-94).

After May 8, 1986, Williams from time-to-time was able to get his name "in the book" so as to be excused from work (A 297-98). But this was only because Williams' supervisor regularly checked "the book" to see if anyone had canceled out. Cook, on the other hand, was instructed to stop using this procedure for his Friday night absences (A 244). Instead of permitting Cook to utilize his paid absence allowances ("PAAs") as an accommodation when Cook exercised his right to take eight hours leave under

Chrysler's PAAs, Chrysler counted it as an unexcused absence (A 1212). Ordinarily, if an employee asked to use a PAA in advance, the absence was excused with pay (A 542-43).[9] According to Cook's area manager, he never considered excusing Cook's Friday night absences on the basis of religious conviction because "[Cook's] reason was not to me as important as anybody else's reason to be off on Friday night." (A 1245). Chrysler thus gave preference to secular reasons lacking statutory protection over religious reasons originally granted such protection.

Williams, on the other hand, used his paid absence allowance to be excused on Friday nights. Even after his PAAs were exhausted, Williams' foreman allowed him off work Friday nights without penalty (A 299-300).

Cook, however, was told that he if left work early on Friday nights he would be treated as voluntary quit (A 449, 610, 614-15). In addition, Williams was assigned the position of a floater because, in that position it was easier for management to permit Williams to leave on Friday night (A 302, 399-400). The same accommodation, however, was not considered for Cook.

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 71, this Court ruled that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones." Employees' absences were normally excused when using their paid absence allowance leaves, but Cook was not excused for religious reasons. Other employees were not deemed to have quit work if they left work early on Fridays, but Cook was warned that he would be considered to have quit. Williams, on the other hand, was even permitted to complete his 40 hour

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[9] In *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 73 n.3 (5th Cir. 1990), the court stated that "both unpaid leave and voluntary rather than mandatory shift swaps ordinarily would be reasonable; but discriminating between religious and non-religious paid personal leave would not."

workweek by leaving at sunset on Friday and returning at sunset on Saturday. Cook was not so accommodated. Such disparate treatment against Cook exhibits discrimination against religious practices that is the antithesis of reasonableness. *Id.*[10]

It is submitted that an employer may not devise a means to accommodate individuals needing to be off for secular reasons and then deny utilization of that means for religious concerns, particularly when such an arrangement has even been found workable by another supervisor for religious reasons.

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[10] In *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 n.7 (9th Cir. 1989), the court indicated that to the extent an employer provided scheduling consideration for the personal safety concerns of one employee, it cannot discriminatorily deny such consideration for religious needs of others.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

Dated: April 21, 1993

Respectfully submitted,

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
Suite 201, 4545 42nd St., NW
Washington, DC 20016
(202) 363-1773

ROBERT W. NIXON
MITCHELL A. TYNER
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6320

MICHAEL J. HOARE
One Metropolitan Square
24th Floor
St. Louis, MO 63102
(314) 241-7961

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-1385

Jesse L. Cook,

Appellant,

v.

Chrysler Corporation; United Automobile Aerospace, Agricultural Implement Workers Local 110,

Appellees.

Submitted: September 17, 1992

Filed: December 7, 1992

Appeal from the United States District Court for the Eastern District of Missouri.

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

BEAM, Circuit Judge.

Jesse Cook appeals an adverse decision in an action for religious discrimination in employment. We affirm.

I. BACKGROUND

Jesse Cook was employed on the assembly line at Chrysler's St. Louis plants from 1976 until 1986, when he was terminated for excessive absences. Cook is a Seventh Day Adventist. His religious beliefs prohibit work from sun-

down Friday to sundown Saturday. The terms and conditions of Cook's employment are determined in part by a national collective bargaining agreement between Chrysler and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW or Union). This national agreement is supplemented by local agreements between Chrysler and the UAW local representing employees at each Chrysler plant. Under the agreement applicable to Cook, seniority is determined on a plant-by-plant basis and seniority at a plant prevails over seniority with the corporation. Shift assignments at the St. Louis plants are determined by seniority.

Cook was laid-off at Chrysler St. Louis Assembly Plant I and was later offered a position at St. Louis Assembly Plant II, with a loss of seniority.[1] Because he had no seniority at Plant II, he was placed on the evening shift, which requires that he work on Friday nights. He could have retained his seniority if he had remained on lay-off until recalled to Plant I.

The collective bargaining agreement provides a negotiated no-fault absenteeism policy, known as the Uniform Attendance Procedure. The policy deals with excessive and chronic absenteeism and provides a six-step system of progressive discipline and also provides grievance and arbitration procedures. Any employee absent more than twenty percent of his regularly scheduled time is subject to discharge. In addition, the local agreement at plant II was amended in 1985 to address the particular problem of Friday night absenteeism. Under the amended system, known as the "excused in advance system" or "book procedure," employees could sign up in a book for an excused day off on a first-come-first-serve basis. Fridays are most sought for excused absences.

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[1] The conditions for transfer between plants are also determined by the collective bargaining agreement.

After his transfer to Plant II in January, 1986, Cook informed his supervisor of the need for accommodation of his religious beliefs. Cook proposed a shift change, working on a Sunday instead of Friday, or a flexible schedule. His supervisor contacted the union shop steward and the labor relations supervisor in an effort to find an accommodation. Cook missed work every Friday night and was late every Saturday night. He was disciplined after his sixth and seventh absences, pursuant to the six-step procedure for discipline, but was not disciplined for eight subsequent absences while Chrysler and the UAW investigated his request. He was then informed that Chrysler could not accommodate him by changing his shift. Cook continued to miss work on Fridays and was eventually terminated.

Cook brought suit against Chrysler and the UAW (collectively, "defendants") in district court under Title VII of the Civil Rights Act of 1964. He alleged he was terminated by Chrysler on the basis of his religion and also alleged that the Union failed to represent him on the basis of his religion. The district court entered judgment for defendants after a bench trial. The district court found that Chrysler's efforts to accommodate Cook satisfied the requirements of Title VII and that the Union had not breached any duties to Cook.[2]

On appeal, Cook essentially contends that there is insufficient evidence to support the judgment. He further contends that the district court misinterpreted applicable law.

II. DISCUSSION

Section 701(j) of Title VII provides that employers must "reasonably accommodate" the religious beliefs or practices of their employees unless doing so would cause the employers to suffer undue hardship. *Trans World Airlines,*

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[2] There is no dispute that Cook's religious beliefs are sincere and that he established a prima facie case of discrimination.

Inc. v. Hardison, 432 U.S. 63, 75 (1977). The statutory language does not make clear the precise reach of this obligation. *Id.* at 74. Although neither a collective bargaining agreement nor a seniority system may be employed to violate Title VII, the duty to accommodate does not require an employer to take steps inconsistent with an otherwise valid agreement. *Id.* at 79. It is "anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81. Title VII does not require an employer to go that far. *Id.* Differential treatment resulting from accommodation runs afoul of section 2000(e)-2(a)(1) (which sets forth unlawful employment practices) if it: 1) compromises other employees' contractual seniority rights as secured by a collective bargaining agreement; or 2) confers a privilege, the cost of which is more than *de minimis,* solely on the basis of the recipient's religious beliefs. *Brown v. General Motors Corp.,* 601 F.2d 956, 962 (8th Cir. 1979). The present case presents both such situations.

First, accommodating Cook would compromise other employees' contractual rights as secured by the collective bargaining agreement. The collective bargaining agreement provides both a system for determining seniority and an absenteeism policy. Efforts to accommodate Cook would violate the terms of the collective bargaining agreement and contravene the "book" procedures. Cook's first proposal for a change of shift would contravene the seniority provisions. It is not disputed that shift preference is a highly prized aspect of seniority. The record shows that Chrysler approached the Union and tried to find a way to accommodate Cook. The Union was not willing to grant Cook a change of shift out of line with seniority. Chrysler's efforts satisfied the requirements of Title VII in view of the obstacles presented by the collective bargaining agree-

ment. *See Trans World Airlines, Inc. v. Hardison,* 432 U.S. at 83 n.14.

Further, the collective bargaining agreement, coupled with the "book" method for obtaining days off, in itself provided an accommodation of Cook's religious needs. *Id.* at 78 (seniority system, establishing neutral way to minimize occasions when an employee would have to work on a day he would prefer to have off, was in itself a significant accommodation to the religious and secular needs of employees). *See also Johnson v. Angelica Uniform Group, Inc.,* 762 F.2d 671, 674 (8th Cir. 1985) (stating in dicta that a collective bargaining agreement provided a reasonable accommodation).

Second, the district court found that accommodating Cook would result in more than a *de minimis* cost to Chrysler. The district court's conclusion in this regard is ultimately a finding of fact. In particular, we will upset findings of undue hardship and more than *de minimis* cost only if clearly erroneous. *Lake v. B.F. Goodrich Co.,* 837 F.2d 449, 451 (11th Cir.), *cert. denied,* 488 U.S. 826 (1988).

Though we might have reached another conclusion, there is evidence to support the district court's finding that more than *de minimis* cost was involved. We cannot find this conclusion clearly erroneous. All accommodation proposals, other than a simple shift change, involved significant costs to Chrysler: the proposal that Cook be allowed excused absences every Friday meant that he would be a part-time employee but would be paid full-time benefits (Chrysler showed that a typical benefit package was costly to the company; the cost of the benefit package lost because of being absent twenty percent of the time is over $1,500 per year); allowing a temporary part-time employee (or floater) to replace Cook every Friday night meant that Chrysler either had to forego using a floater elsewhere or hire another floater; absences affect the quality of work because there are more repairs than usual and lower ef-

ficiency when a floater is used on the line (there is no way to guarantee the same floater to replace Cook without hiring a new floater). There was also evidence that it was not possible to allow Cook to substitute working on a Sunday for a Friday; the collective bargaining agreement required over-time pay on weekends and the plant was normally closed on Sundays.[3]

Cook argues that this court's decision in *Brown v. General Motors Corp.*, 601 F.2d at 962, mandates that the additional costs must be quantifiable. We disagree. *Brown* stands only for the proposition that an employer's costs of accommodation "must mean present undue hardship, as distinguished from anticipated or multiplied hardship." *Id.* at 961 (quotations omitted). In contrast to the speculative evidence of future impact (calculated with an assumption that more employees would seek Fridays off for religious purposes) presented by General Motors in *Brown*, Chrysler presented evidence of tangible present costs of accommodation. The costs, although not ascertained with exactitude, were present and real. We note further that in *Brown*, neither party contended that the proposed accommodation contravened the collective bargaining agreement. *Id.* at 958.

With respect to the Union, its refusal to waive or modify the collective bargaining agreement's seniority provisions does not constitute unlawful discrimination. *Huston v. Local No. 93, International UAW*, 559 F.2d 477, 481 (8th Cir. 1977). We affirm the district court's finding that the Union did not breach any good-faith duties to represent Cook's interests.

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[3] Even if, as Cook claims, hiring a new floater is not necessary, it would be of no consequence. The apportioned cost of a floater's time, in combination with evidence that there is additional warranty costs associated with temporary workers, is enough to support the district court's decision.

III. CONCLUSION

For the reasons stated above, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1385EMSL

Jesse L. Cook,

Appellant,

v.

Chrysler Corporation; United Automobile Aerospace, Agricultural Implement Workers Local 110,

Appellees.

Filed

Feb 5, 1993

U.S. DISTRICT COURT
E. DISTRICT OF MO.

Appeal from the United States District Court for the Eastern District of Missouri

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JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 7, 1992

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-1385EMSL

Jesse L. Cook,

Appellant,

v.

Chrysler Corporation; United Automobile Aerospace, Agricultural Implement Workers Local 110,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

January 21, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1985C(5)

JESSE L. COOK

Plaintiff,

vs.

CHRYSLER CORPORATION and UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS LOCAL 110,

Defendants.

FILED

DEC. 31, 1991

U.S. DISTRICT COURT
E. DISTRICT OF MO.

MEMORANDUM OPINION

Plaintiff filed this action alleging that defendants Chrysler and Local 110 UAW discriminated against him on the basis of his religion. Plaintiff alleges that Chrysler discharged him and the Local 110 UAW failed to properly represent him due to his religion in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e *et seq.* The case was tried before this Court sitting without a jury on September 14-15 and 18-19, 1989 and December 17-18, 1990. This Court, having now considered the pleadings, the testimony of the witnesses, the depositions testimony, the documents in evidence and the stipulation of the parties, and being fully advised in the premises, hereby makes

the following findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52.

FINDINGS OF FACT

Plaintiff Jesse Cook is a citizen of the United States who resides within the Eastern Division for the Eastern District of Missouri. Plaintiff Cook is an "employee" within the meaning of Title VII. Defendant Chrysler is a corporation duly organized and existing under the law and is an "employer" within the meaning of Title VII. The United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and the Local 110 UAW are "labor organizations" within the meaning of Title VII.

At all times relevant to this cause of action, Chrysler owned and operated two motor vehicle assembly plants in Fenton, Missouri known as Plants 1 and 2. The UAW represents production and maintenance workers employed at both plants under a national collective bargaining agreement with Chrysler. This national collective bargaining agreement is supplemented by a local agreement at each of the plants. The national collective bargaining agreement was in effect during the time period relevant to plaintiff's cause of action. Local 110 UAW (Union) is a local labor union affiliated with the UAW and covered by the national collective bargaining agreement with Chrysler. It represents more than 3000 production and maintenance workers employed at Plant 2 and is a party to the local agreement with Chrysler covering those employed at Plant 2. The local agreement was in effect during the time period relevant to plaintiff's cause of action.

The national agreement sets forth a two-shift production schedule. Shift 1 operates Monday through Saturday from 8:00 AM to 4:00 PM. Shift 2 operates Monday through Saturday from 4:00 PM to midnight. There is generally no production work scheduled on Sunday; however if it is, such work is considered double-time work and is compen-

sated at a higher hourly rate. The work schedule or shift times can not be changed by Chrysler without Union vote and approval.

The national agreement also sets forth a no-fault absenteeism policy, known as the Uniform Attendance Procedure. Under the Procedure, no discipline is mandated for the first six (6) absences in any six (6) month period (excused or unexcused) but additional unexcused absences result in progressive discipline in six (6) successive steps. For the first unexcused absence (after the first six non-sanctioned absences), the worker is counseled by both Chrysler management and the Union. The second is additional counseling, the third is a five (5) day disciplinary lay-off, the fourth is a fifteen (15) day disciplinary lay-off, the fifth is a thirty (30) day disciplinary lay-off, and the sixth results in permanant discharge from employment. Chronic absenteeism is also addressed by the national agreement. Any employee who is absent over 20% of the time over a six (6) month period (counting a five-day workweek) is counseled. If the absenteeism continues, the employee faces discharge.

In 1985, Plant 2's local agreement with Chrysler was amended to address a growing problem with absenteeism, especially on Friday nights. An "excused in advance" program was set up by which employees could sign up in a book for an excused day or night on a first come, first serve basis. Time off may be signed for no more that thirty (30) days in advance. The book fills up for Friday nights faster than any other time period.

Under the terms of the national agreement, if employees are on lay-off at Plant 1 and there are openings at Plant 2, they are offered the option to work at Plant 2 in accordance with their seniority until all slots are filled. If an employee is offered and refuses the transfer, s/he is not entitled to receive the unemployment benefits provided to laid-off workers under the national agreement. If an

employee transfers, his/her seniority at the originating plant does not count, and the seniority date at the new plant is the date of transfer. The employee stays at the new plant until s/he is laid-off, at which time s/he has the option to return to the originating plant (if jobs are available) with the same seniority or stay laid-off.

Each plant negotiates separately for its own local agreement with Chrysler. Seniority is on a plant-by-plant basis. Employees at each plant are laid-off, recalled, and select shifts on the basis of their seniority at that particular plant and their seniority within each particular department in the plant. There is no interchange of seniority between the two plants. Seniority, at Plant 2, determines shift preference, vacation preference, job assignments, and other various personnel matters.

Seniority provisions, especially shift preference, is highly valued by workers. The right to assert shift preference is embedded in Plant 2's local agreement with Chrysler and can not be amended, modified, or removed without (re)negotiation, ratification, and approval by membership vote. The seniority provisions can not be changed or eliminated independently by UAW officers, Union officers, or Chrysler management. The seniority provisions, especially shift preference, is personal to each union member and is asserted and defended by virtue of both the national agreement and the local agreement.

The national agreement provides a procedure for the adjustment of grievances, including challenges to discipline assessed by Chrysler. The procedure begins at the supervisor level, then proceeds to the area manager level, and then to the plant manager level. If the grievance cannot be resolved at any of these levels, the matter proceeds to an appeal board, which consists of two Chrysler representatives and two UAW representatives. If the grievance cannot be resolved, the UAW has the option of proceeding to arbitrate the matter to a final decision. As a practical

matter, the grievances are handled by Union representatives and Chrysler labor relations representatives.

Plaintiff Cook began his employment with Chrysler, at Plant 1, in January 1976. During periods of lay-off, plaintiff transferred back and forth between Plants 1 and 2. In 1983, plaintiff was recalled to Plant 1 on the second shift. He remained at Plant 1 on the second shift until an indefinite lay-off in November 1985. Plaintiff remained on indefinite lay-off until January 14, 1986, when he elected to transfer to Plant 2 on the second shift. January 14, 1986 became his seniority date at Plant 2.

At Plant 2, during the relevant time period, plaintiff held one of the less desirable jobs on the assembly line. His job was primarily to install the spare tire and jack in the trunk of the car. This job was one of approximately thirty (30) jobs on the assembly line. In order to keep things running smoothly, plaintiff's job (as well as the other jobs on the line) had to be completed within a designated timeframe. Plaintiff's job required a certain level of competency not easily replaced. Absenteeism on the line resulted in increased number of complaints and repairs.

In October 1985, shortly before his indefinite lay-off at Plant 1, plantiff became a member of the Seventh Day Adventist Church. One of the tenets of the Church is that a member may not do manual labor or other types of secular labor from sundown Friday to sundown Saturday. While at Plant 1, after plaintiff became a Seventh Day Adventist and shortly before his indefinite lay-off, plaintiff was assessed Step 1 discipline under the Uniform Attendance Procedure due to unexcused absences on Friday nights. He transferred to Plant 2 before any additional disciplinary measures were taken for his unexcused Friday night absences.

On January 17, 1986, shortly after transferring to Plant 2, plaintiff delivered two letters to Edward Pope, Employment Supervisor at Plant 2. One letter was written

to Mr. Pope advising him of plaintiff's religious beliefs and a request for accommodation; the other letter was from plaintiff's pastor, W. E. Dagenais. Pope made copies of the letters and told plaintiff to deliver his letters to plaintiff's supervisor, Robert Brinkley.

Plaintiff then delivered his letters to Brinkley, who advised plaintiff that he would get back to him about the accommodation request. Although it is unclear as to who was contacted next about plaintiff's request, it is agreed that Ken Davenport (Union Shop Steward), Thomas Kallaos (Labor Relations Supervisor), and Donald Woemmel (Union President) all were informed of plaintiff's situation.

In his letter of January 17, 1986, Cook acknowledges that the local agreement with Chrysler (for Plant 2) makes no provision for an accommodation for persons who "keep the Sabbath". He suggests possibilities whereby Chrysler might accommodate him. These include flexible scheduling, the use of compensatory time, making lateral transfers without loss of seniority, arrange shift trades and/or time swaps, and allow temporary accommodations while a permanent accommodation is being arranged.

After transferring to Plant 2 in January 1976, plaintiff was absent every Friday night and late for work every Saturday night. Pursuant to the Uniform Attendance Procedure, Cook was assessed Step 1 discipline after his sixth absence and then was issued a Step 2 discipline for his seventh absence. Thereafter, although Cook continued with his Sabbath absences for more than eight weeks, he was not disciplined. Cook was not told specifically why the absences were not being disciplined but he was told by Brinkley that Chrysler was looking into his accommodation request.

Meanwhile, Thomas Kallaos was investigating possible solutions to the problem. He determined that the only way to accommodate Cook without violating the local agreement was to see if Cook's seniority would allow a transfer

to the first shift. Kallaos checked Cook's seniority and discovered that he did not have seniority to allow such a transfer. Kallaos then spoke with Reggie Crocker, Chrysler's Equal Employment Opportunity Supervisor in Detroit, Michigan. Crocker advised Kallaos that if Cook did not have seniority for a transfer to the first shift, then Kallaos could ask the Union for permission to place Cook on the first shift out of line with seniority. Crocker further advised Kallaos that if the Union refused permission for the transfer, then he had two options: 1) advise plaintiff that the Union refused permission to transfer plaintiff to the first shift out of line with seniority; or 2) transfer plaintiff to the first shift anyhow and let the Union grieve the action. Finally, Crocker advised Kallaos that if Cook was not transferred to the first shift, then Cook had to work Friday nights but that his tardiness could be accommodated on Saturday night. Absenteeism is not as much of a problem on Saturday night as it is on Friday night.

If Cook was off every Friday night with or without pay, Chrysler would still be required under the collective bargaining agreement to pay the cost of his benefits, which costs assume an employee works a full work week. The cost of the benefit package lost because of being absent 20% of the time (approximately one day per week) is $1578 per year. The plant costs allocated to each employee which are lost by an employee being absent one day every week exceed $5000 per year.

Temporary part-time employees (TPTs) are persons hired to cover casual absences; not regular permanant on-going absences. By contract, TPTs work only on Mondays and Fridays. If a TPT works more than 120 days, the National Agreement with Chrysler provides for additional benefits for that TPT. TPTs are generally trained on the job and do not fill in for a regular worker on a constant basis. Consequently, Chrysler can not guarantee the same TPT would fill in for plaintiff every Friday night.

"Floaters" are full-time employees who replace other workers absent due to vacations, advanced excused absences, or medical emergencies and/or leaves. They work the same shift schedules as regular line workers and are paid full benefits. If a floater were to replace someone, like plaintiff, on a constant regular basis, another floater would have to be hired in order to keep an adequate number of floaters available (for the other absences).

After speaking with Crocker, Kallaos then spoke with Don Woemmel. Kallaos asked permission to transfer Cook to the first shift out of line with seniority. Woemmel refused stating that such a transfer was in breach of the local agreement and would prejudice the rights of the other workers at Plant 2 with more seniority than Cook. He reminded Kallaos that a waiver of shift preference rights or modification of the local agreement could not be done unilaterally by either Chrysler or the Union without the affirmative vote and approval of the Union membership.

Kallaos then talked with Richard Burton, the Union's Regional Supervisor. Burton took the exact same stance as did Woemmel, for the same reasons.

On May 6, 1986 Robert Brinkley and John McFarland (Chrysler Plant Final Area Manager) met with plaintiff and gave him a written supervisor's report. This report informed plaintiff that he did not have seniority to transfer to the first shift, that further absences on Friday nights would be unexcused, and that these unexcused absences would be treated like any other unexcused absence under the Uniform Attendance Procedure. Another Seventh Day Adventist, Roger Williams, was given the same supervisor's report. Williams had been accommodated for a time being while at Plant 1. The same accommodation was short-lived at Plant 2. After the May 6th supervisor's report, Williams used the book procedure and leaves of absence to continue his employment. He eventually accrued enough seniority to transfer to the first shift.

Thereafter, Cook continued for the most part to accrue unexcused absences on Friday nights. He was progressively disciplined pursuant to the Uniform Attendance Procedure and the chronic absenteeism procedures. At each unexcused absence disciplinary step, the Union filed a grievance on behalf of Cook. On September 12, 1986 plaintiff absented himself and consequently on September 16, 1986 was issued Step 6 discipline and was discharged by Chrysler.

The Union then proceeded to file a discharge grievance with the Appeal Board of the UAW. The Union sought reinstatement of Cook and the use of a "floater" on the nights he was absent. The Union also sought a continuing excused absence for Cook's Sabbath hiatus. Chrysler rejected the Union's proposal. The Union did not take the matter to arbitration because on the face of it the discharge was proper under the Uniform Attendance Procedure and the chronic absenteeism procedures.

Plaintiff remained unemployed until May 1987 when he began work with Central States Services. Since his discharge through December 17, 1990, Cook earned $73,558.45 in wages and unemployment compensation. If Cook had remained employed at Chrysler through December 17, 1990, he would have earned $141,920.73.

On September 27, 1986 Cook filed an EEOC charge of religious discrimination against Chrysler. The EEOC issued a Right to Sue letter on July 30, 1987. Cook filed this action on October 27, 1987. He seeks reinstatement, back pay, seniority, lost benefits, and legal fees.

CONCLUSIONS OF LAW

Plaintiff Cook has brought suit alleging employment discrimination on the basis of religion. The Court has jurisdiction pursuant to §706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5. Plaintiff has satisfied all the procedural prerequisites to suit under Title VII. The

parties all agree that plaintiff has met the burden of establishing a prima facie case of religious discrimination in that 1) plaintiff has a bona fide religious belief that conflicts with an employment requirement; 2) plaintiff informed both Chrysler and the Union of this belief (i.e. working Friday nights violated the Seventh Day Adventist prohibition against secular work on the Sabbath); and 3) plaintiff was disciplined and eventually discharged for failure to comply with the conflicting employment requirement. *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d. 671, 673 (8th Cir. 1985); *Brown v. General Motors Corp.*, 601 F.2d. 956, 959 (8th Cir. 1979).

Title VII, as amended, makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of religion. 42 U.S.C. §2000e-2(a)(1). This section of Title VII must be read in conjunction with the section which defines religion to include all aspects of religious observance and practice, as well as beliefs, the employer must reasonably accommodate unless s/he can demonstrate undue hardship in so doing. 42 U.S.C. §2000e(j). Title VII also makes it an unlawful employment practice for a labor organization to discriminate against any person because of religion or to cause or attempt to cause an employer to discriminate on the basis of religion. 42 U.S.C. §2000e-2(c).

Once a plaintiff has made out a prima facie case of religious discrimination, the burden shifts to the employer to produce evidence showing that it can not reasonably accommodate the employee without incurring undue harship. *Protos v. Volkswagan of America, Inc.*, 787 F.2d. 129, 134 (3rd Cir. 1986). The employer's burden is one of "production rather than persuasion, and the plaintiff bears the ultimate burden of establishing by a preponderance of the evidence that defendant could have reasonably accommodated his religious beliefs and practices without undue hardship. . .". *Boomsma v. Greyhound Food Management, Inc.*, 639 F.Supp. 1448, 1452 (W.D. Mich. 1986), *appeal*

dismissed, 815 F.2d. 76 (6th Cir. 1987). Furthermore, once the employer has demonstrated that it has offered a reasonable accomodation to the employee, the statutory inquiry ends. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68-69 (1986). The employer must produce evidence of undue hardship only if it professes an inability to offer any reasonable accommodation. "[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accomodation without such hardship." *Ansonia*, at 69.

Plaintiff contends that defendant Chrysler chose to ignore his situation instead of taking steps to reasonably accommodate him by transferring him to the first shift or excusing his Friday night absences and using TPTs or floaters to fill in for him. He further argues that the Union failed to protect his employment rights by refusing Chrysler permission to transfer plaintiff out of seniority and by failing to arbitrate his discharge grievance. The Court finds that Chrysler and the Union both met their Title VII obligations.

Both Chrysler and the Union testified uncontrovertably that the national agreement and the local agreement controlled the degree of flexibility each had in addressing plaintiff's situation. Thomas Kallaos, Donald Woemmel, and Melvin Jarvis (Alternate Shop Steward) all testified that there were no alternatives for Cook without violating the collective bargaining agreements. Transferring plaintiff to the first shift out of seniority clearly violated the seniority provisions of the local agreement. Excusing plaintiff every Friday night clearly violated the Uniform Attendance Procedure and the chronic absenteeism policy.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Supreme Court held that Title VII did not require an employer to undertake any activity to accommodate an employee which would violate a bona fide seniority system. Title VII's reasonable accommodation

requires only that an employer make a good faith effort to accommodate the employee's religious beliefs. "It does not require that in doing so an employer override an established seniority system, nor does it require that an employer take steps that go beyond those a reasonable person would take." *Krushinski v. Roadway Exp., Inc.*, 626 F.Supp. 472, 473-474 (M.D. Pa. 1985). Title VII's mandate to employers to try to reasonably accommodate religious needs "does not supercede the contractual rights of other employees." *Huston v. Local No. 93, International UAW*, 559 F.2d. 477, 480 (8th Cir. 1977). This same limitation is equally applicable to the unions. A union may be able to grant a variance if it met with approval of the membership, but "it certainly could not vary the seniority provisions of the collective bargaining agreement in disregard of the contractual rights of employees who wished to be afforded the benefits of their seniority." *Huston*, at 480.

There were only two options available to accommodate Cook without incurring undue hardship. Granting Cook a preference in the seniority structure would violate the local agreement; notwithstanding the fact it would create very hard feelings among Cook's fellow employees, especially those with more seniority who qualified but could not transfer due to lack of openings. Additionally, Chrysler officials testified that since no openings existed (during the time in question) on the first shift, someone would have to be bumped to make room for Cook. The Court can only imagine the degree of animosity and hostility such a move would create. Excusing Cook every Friday night would circumvent the "book procedure" specifically set up to afford everyone equal opportunity to arrange absences. Constant Friday night absences would also conflict with the chronic absenteeism policy. Circumventing the book procedure and the chronic absenteeism policy would violate the local agreement and supercede the contractual rights of Cook's fellow workers.

The other options that plaintiff feels should have been considered are equally violative of the collective bargaining agreements or would cause undue hardship to Chrysler. An employer is not obligated to take accommodation steps which would require it to incur additional costs, such as overtime pay for replacements, if such costs were more than *de minimis*. *TWA v. Hardison*, at 84-85; *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d. 441, 445 (8th Cir. 1979) [citing in affirmance, *Wren v. T.I.M.E.-D.C., Inc.*, 453 F.Supp. 582 (E.D. Mo. 1978)].

Cook's absence on the assembly line every Friday night would involve additional costs to Chrysler, both in the form of lost efficiency and increased employee wages. Thomas Kallaos testified that there were no shifts or departments that plaintiff could transfer into (in line with his seniority) that would not require Friday or Saturday work. He testified that the local agreement did not provide for swapping shifts or trading seniority and neither Chrysler nor the Union could force employees to do so. Substituting Sunday work for plaintiff's Sabbath absences was not possible because no production was normally scheduled on Sunday. If production was scheduled on Sunday, the local agreement mandated double-time wages. He further testified that the collective bargaining agreements did not provide for a flexible work schedule within the shifts. Furthermore, since plaintiff's Sabbath absences would change seasonly (even perhaps weekly or monthly as times for sunset and sunrise change), it would be very difficult to schedule other employees to cover plaintiff's absences. Finally, the collective bargaining agreements did not provide for "temporary" assignments.

Using TPTs or floaters would create additional expense to Chrysler. Not only would Cook continue to receive his full benefits despite working a four-day week, but Chrysler would have to pay the TPT or floater wages and benefits. In order to keep the replacement pool number adequate (to cover other workers' absences) Chrysler would have to

hire (and pay) someone to replace the person replacing Cook every Friday night. Lost efficiency was another price Chrysler would have to pay for Cook's absences. Jarvis and Ron Czar (Chrysler Quality Manager) testified to increased number of repairs during Cook's absences. Absenteeism directly affected the quality of workmanship. Absenteeism also directly affected morale among the workers on the line. Brinkly and Jarvis testified to increased number of complaints (when plaintiff was absent) regarding the number of repairs that had to be done on the job plaintiff normally performed and the slow performance of the replacement workers.

The testimony of Chrysler and the Union witnesses remained largely undisputed by plaintiff. Instead his main contention is that the defendants did not do enough to figure out a way to accomodate his religious needs. While it is true that defendants cannot excuse their failure to accomodate him by simply "sitting on their laurels" or pointing to the deficiencies in plaintiff's suggested alternatives, plaintiff cannot maintain a posture of uncooperativeness. *Hudson v. Western Airlines, Inc.*, 851 F.2d. 261, 266-67 (9th Cir. 1988); *Anderson v. General Dynamic*, 589 F.2d 397, 401 (9th Cir. 1978); *Krushinski*, at 474-75; *Wren*, 453 F.Supp. at 584. The trial record is very quiet as to steps taken by the plaintiff to eliminate the conflict between his religious beliefs and employment demands. Plaintiff used the book procedure a couple of times, but for the most part simply did not show up for work on Friday nights and arrived late for work on Saturday nights. He chose not to use the means available within the system, such as the book procedure, vacations, leaves, etc. to avoid discipline. Although the employer has an accommodation duty, the employee has a correlative duty to make a good faith attempt to satisfy (her) needs through means offered by the employer. *Hudson*, at 266-67; *Krushinski*, at 474; *Wren*, 453 F.Supp. at 584. "An employee cannot shirk his duties to try to accommodate himself or to cooperate with

his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer." *Chrysler Corp. v. Mann*, 561 F.2d. 1282, 1285 (8th Cir. 1977). Plaintiff did little to fulfill his mutual obligation to cooperate. "A failure of cooperation by either party will clearly lessen the chances of achieving a reasonable accommodation." *Chrysler Corp. v. Mann*, at 1285.

The defendants, on the other hand, did all they were required to do under Title VII. Chrysler management did not overly exert itself in assisting plaintiff. However, it did make efforts within the seniority system to accommodate plaintiff. *See, Wren*, 453 at 584. Kallaos looked into plaintiff's seniority status. He conferred with representatives of the Church. He sought advice from Chrysler's EEO Supervisor and attempted to get permission from the Union to transfer plaintiff to Shift 1 out of seniority. He sought a way to assist Cook within the seniority system but couldn't find a way. The collective bargaining agreements were a maze of restrictions. Everywhere he turned he ran into a "violation" wall. Other options would require Chrysler to bear more than a *de minimis* cost in order to give plaintiff the Sabbath off.

The Union officials were equally stymied by the collective bargaining agreements. The Union had no duty to waive or modify the seniority provisions of the local agreement to the detriment of its members. Its refusal to do so neither constituted unlawful discrimination against plaintiff or caused such discrimination by Chrysler. *See, Huston*, at 481. The Union's only duty to plaintiff was to protect and defend his statutory and contractual employment rights. It carried out this duty in good faith by filing a grievance on behalf of plaintiff at every discipline step. It took his discharge grievance to the Appeals Board. After that it conceded that plaintiff was properly discharged pursuant to Step 6 of the Uniform Attendance Procedure. John Guinan (the UAW representative to the Appeals

Board) testified that arbitration was pointless because the discharge was in conformity with the collective bargaining agreements and the Uniform Attendance Procedure. The Union had the right to determine the viability of plaintiff's grievance and cannot be faulted for concluding that his grievance was not a good candidate for arbitration. Failure to secure for plaintiff the relief he wanted does not evidence a breach of the Union's good faith duty to represent plaintiff's interests.

The defendants explored every avenue for the purpose of accommodating plaintiff but simply were unable to do so due to Cook's seniority (or lack thereof) and the collective bargaining agreements. Title VII did not compel them to trample upon everyone else's non-discriminatory contractual rights in order to accommodate plaintiff's religious beliefs. The defendants provided a seniority system, which in itself, represented a significant accommodation to the needs, religious and secular, of all employees. *Hardison*, at 77-78. Title VII does not require an employer or union to discriminate against some employees in order to allow others to observe their Sabbath. *Hardison*, at 85. Title VII also does not require differential treatment which would confer a privilege, the cost of which was more than *de minimis*, solely on the basis of religious needs. *Hardison*, at 81-85; *see also, Brown*, at 962.

The collective bargaining agreements provided a seniority system designed to protect all employees' rights by insuring fair and equal treatment. It wasn't a perfect system and in plaintiff's case proved to be more of a hindrance than a help. However, given the particular circumstances of this case, the Court concludes that defendants Chrysler and the Union satisfied their "reasonable accommodation" obligation as required by Title VII.

For the foregoing reasons, the Court enters judgment in favor of the defendants Chrysler and the Union and against plaintiff Cook on the merits of plaintiff's complaint.

Dated this 31st day of December, 1991.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

APPENDIX E

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.

1605.2 Reasonable accommodation without undue hardship as required by Section 701(i) of Title VII of the Civil Rights Act of 1964.

1605.3 Selection practices.

Appendix A to §§ 1605.2 and 1065.3 Background information.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welch v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j). 42 U.S.C. 2000e(j).

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[1] See CD76-104 (1976), CCH P 6500; CD 71-2620 (1971), CCH P 6283; CD 71-779 (1970), CCH P 6180.

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.*

This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as § 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.*

(1) Section 701(j) makes it an unlawful employment practice under § 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with § 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

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[2] See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of Section 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as employment agencies (§ 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (§ 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable Accommodation.*

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities such as compensation, terms, conditions, or privileges of employment. Therefore, when there

is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for Accommodating Religious Practices.*

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and

labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit com-

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. I. 95-390. 5 U.S.C. 5530, "Compensatory Time Off for Religious Observances."

pliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue Hardship.

(1) Cost.

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison,* would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is

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[4] *Hardison, supra,* 432 U.S. at 84.

necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra,* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) Scheduling of Tests or Other Selection Procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on

these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification;

and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Supreme Court, U.S.
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No. 92-1696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JESSE L. COOK,
Petitioner,
v.

CHRYSLER CORPORATION and
LOCAL 110 OF THE
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR UAW LOCAL 110

MORRIS J. LEVIN
APPLETON, KRISTMAS, LEVIN & BEATTY
8000 Maryland Ave.
Clayton, MO 63105
(314) 721-8685

JORDAN ROSSEN
General Counsel
M. JAY WHITMAN
(Counsel of Record)
Associate General Counsel
8000 East Jefferson Ave.
Detroit, MI 48214-2699
(313) 926-5216
Counsel for UAW Local 110

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was a timely Petition for *Certiorari* filed as to Local 110, when the Petition names only Local 136, a non-party?

2. Under *TWA v. Hardison*, 432 U.S. 63 (1977), was Local 110 required to abandon the seniority of other employees, or the use of bargained seniority procedures, *e.g.*, a "first-come-first-served" signup book for Friday absences, to accommodate Cook's religion?

3. Was the finding of the trial Court that other accommodations would impose more than a *de minimus* burden on Chrysler, as affirmed by the Eighth Circuit, clearly erroneous under F.R. Civ. Pro 52(a)?

PARTIES TO THE PROCEEDINGS

Petitioner lists the parties to the proceedings below as "Jesse Cook, the petitioner, and Chrysler Corporation and United Automobile, Aerospace and Agricultural Implement Workers Local 136, respondents." Pet. at ii.

As to the Union party, this is incorrect. Chrysler operated two sister plants in Fenton, Missouri. Plant I was represented by UAW Local 136. Plant II was represented by UAW Local 110. Petitioner was on layoff from Plant I. He then chose to take a job in Plant II, under the jurisdiction of Local 110. The resulting loss of plant seniority put him on the Second Shift at Plant II, and so began the events leading to his discharge by Chrysler. Local 110 filed the grievance at issue, and was the Union party in both the District Court and the Eighth Circuit. (Pet. App. 1a, 8a, 9a, & 10a.)* Local 136, named in the instant Petition, was not a party below.

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* The original Complaint erroneously sued Local 136. This was corrected in the Amended Complaint, which named only Local 110. I Appellant's Appendix at 7. The November 25, 1987 docket entry in the District Court recited ". . . Local 110 in substitution for the deft. Local 136 previously named (by error) fld." I Appellant's Appendix at 2.

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IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION FOR UAW LOCAL 110

Local 110 of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported: *Cook v. Chrysler & UAW Local 110*, 981 F.2d 336 (8th Cir. 1992) (*per* Beam, J.), *affirming* 779 F. Supp. 1016 (E.D. Mo. 1991) (*per* Limbaugh, J.).

JURISDICTION

The Petition asserts jurisdiction under 28 U.S.C. § 1254(1), to review a judgment under the religious discrimination provisions of Title VII, 42 U.S.C. § 2000e-2(a), (c) & (h). The Eighth Circuit's judgment was entered December 7, 1992, and rehearing denied January 21, 1993. This Petition was filed April 21, 1993.

Local 110 respectfully submits that, as to Local 110, no timely Petition has been filed. Under Rule 13.1, a Petition is *only* timely if it is filed "within 90 days after the entry of the judgment." Both the caption and the body of the Petition name "Local 136", which is not a party. Local 110 is *not* named, although it was substituted in the first days of the litigation at Petitioner's own instance.

COUNTERSTATEMENT OF THE CASE

The best statement is that of the Eighth Circuit, relying on the District Court's trial findings.[1] It has the added advantage of being neutral:

Cook was employed on the assembly line at Chrysler's St. Louis plants from 1976 to 1986, when Chrysler terminated him for excessive absences. Cook is a Seventh Day Adventist, whose beliefs prohibit work from sundown Friday to sundown Saturday. His terms and conditions of employment are set by a National Agreement between Chrysler and the UAW, which is supplemented by a local agreement between Chrysler and the relevant Local. Under the labor agreements, seniority is determined on a plant-by-plant basis, and seniority at a plant prevails over seniority with the Corporation. Shift assignments, in particular, are determined by plant seniority.

Cook was on layoff from Plant I, represented by Local 136. He was offered an open job at Plant II, represented

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[1] 981 F.2d 336, 337-38, Pet. App. 1a-3a; and 779 F. Supp. 1016, 1018-22, Pet. App. 11a-18a.

by Local 110. He took the job at Plant II and, because he had no seniority at Plant II,[2] was placed on the evening shift, which worked on Friday nights. He could have retained his seniority if he had remained on layoff until recalled at Plant I.

The collective bargaining agreement provides for a negotiated, no-fault absenteeism policy, known as the Uniform Attendance Procedure. It deals with excessive and chronic absenteeism, providing a six-step system of progressive discipline, subject to grievance and arbitration procedures. Any employee absent more than 20% of his regularly scheduled time is subject to discharge. In addition, the Local Agreement at Plant II (Local 110) was amended to address a particular problem with Friday night absenteeism. Fridays are the most sought for excused absences. The amendment, known as the "excused in advance system" or "book procedure", required that, to get an excused day off on Friday, the employees had to sign up in a book on a first-come-first-served basis.

Cook took the job in Plant II, represented by Local 110, in January, 1986. Because he had no plant seniority at Plant II, he was assigned to the afternoon shift. Cook informed his supervisor of the need for accommodation of his religious beliefs, proposing a shift change, working on Sunday instead of Friday, or a flexible schedule. The matter was taken up with Chrysler's labor relations and Local 110. The Local refused to waive the seniority provisions which governed shift preference and scheduling, as well as the "book" procedure on Friday absences. Chrysler began disciplining Cook and, seven months later, on September 16, 1986, fired him under the Uniform Attendance Procedure. Local 110 filed grievances on each discipline, which Chrysler denied. (A. 555-561)

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[2] Like the Court below, we use "seniority" here to refer to "competitive" rather than "benefit" seniority.

Local 110 sent the discharge grievance to the final step, the Chrysler-UAW Appeal Board in Detroit. The International Union sought reinstatement of Cook, suggesting the use of a "floater" on the nights he was absent, or a continuing excused absence for Friday nights. Chrysler rejected the proposal, and the International Union withdrew the grievance because, on the face of it, the discharge was proper under the Uniform Attendance Procedure.[3]

This litigation followed. After six days of trial, the District Court granted judgment for both Chrysler and Local 110, holding, as to the Local, that "failure to secure for plaintiff the relief he wanted does not evidence a breach of the Union's good faith duty to represent plaintiffs interest."[4] The trial Court held that the "Union had no duty to waive or modify the seniority provisions of the local agreement to the detriment of its members."[5] Refusal to do so, the District Court held, "neither constituted unlawful discrimination against plaintiff or caused such discrimination by Chrysler."[6] As to both Chrysler and Local 110, the trial Court held that the duty of "reasonable accommodation" was satisfied.[7]

As to Chrysler, the District Court went on to find, as a matter of fact: "Other options would require Chrysler to bear more than a *de minimus* cost in order to give plaintiff the Sabbath off."[8] In particular, the trial Court cred-

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[3] 779 F. Supp. at 1021, Pet. App. 18a.

[4] 779 F. Supp. at 1025, Pet. App. 25a.

[5] 779 F. Supp. at 1024, Pet. App. 24a.

[6] 779 F. Supp. at 1024-25, Pet. App. 24a.

[7] 779 F. Supp. at 1025, Pet. App. 25a.

[8] 779 F. Supp. at 1024, Pet. App. 24a.

ited evidence that Chrysler would suffer additional costs both in money and lost efficiency.[9] The use of TPT's [10] or "floaters" would impose additional wage and benefit costs on Chrysler.[11]

This, of course, is exactly why the UAW favored such a solution and Chrysler rejected it.[12] The Union wanted the absences covered, not at the expense of another employee's seniority, but by Chrysler having to increase the complement of employees needed at Plant II to cover absences. The Union's goal was to increase work opportunities, particularly when workers were laid off. Success would, in addition, create a precedent and an opening for future negotiations.

Chrysler had the opposite goal, inspired by the fact that Cook got the full benefit package (as did his replacement) even though Chrysler got only four days of work out of him, rather than a whole week.

The Eighth Circuit affirmed, finding both that the reasonable accommodation was offered. As to Chrysler, the Court of Appeals affirmed the trial Court's factual finding, as not clearly erroneous under F.R. Civ. Pro. 52(a), that any other accommodation would impose more than *de minimus* cost, and so undue hardship under *TWA v. Hardison*, 423 U.S. 63 (1977).[13]

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[9] 779 F. Supp. at 1023-24, Pet. App. 22a-23a.

[10] TPT's are temporary part-time employees. "Floaters" or "pool" employees are regular, seniority employees who are held in a replacement pool to cover vacancies on the line.

[11] 981 F.2d at 339, Pet. App. 5a-6a.

[12] Supp. App. 621-23, 645, 665.

[13] 981 F.2d at 339, Pet. App. 22a-24a.

ARGUMENT

This litigation, like most, is of intense importance to those directly involved. The legal issues, nevertheless, are prosaic, and are cast up in a context which is both fact-specific and otherwise ill-suited for this Court's review.

I. NO TIMELY PETITION AS TO LOCAL 110

The first reason to deny *certiorari* is that no petition has been filed as to Local 110, nor can one now be filed in a timely manner under Rule 13.1. The Petition, both in its caption and text, names only Local 136, a non-party. *Cf., Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (use of "*et al.*" in notice of appeal jurisdictionally inadequate designation of appellants under F.R.A.P. 3(c)). Local 110 has been the party since November 25, 1987, when it was substituted on Petitioner's own amendment to the Complaint.

II. *TWA v. HARDISON* IS NOT IN NEED OF GLOSS OR REVISITATION

Petitioner urges that *TWA v. Hardison*, 432 U.S. 63 (1977) had led the Circuits into a confused disarray of approaches, particularly as regards accommodations contrary to (what Petitioner denominates) "non-seniority" provisions of labor agreements. Pet. 11-21.

No such disarray exists, beyond the normal variation of results born of differing facts. Sabbatarian cases, like this one, turn on seniority issues. This is for the simple reason that the key issue is whether plaintiff must work the afternoon shift, and, at least in unionized settings, shift preference is *universally* determined by seniority, directly or indirectly. That is not to say that other provisions of the collective bargaining agreement cannot get entangled. For instance, an employee may walk off his afternoon shift job at sundown, disobeying a direct order. When he gets fired for disobedience to the order,

it hardly means that a non-seniority provision of the labor agreement (*i.e.*, the Shop Rule against that disobedience) precludes a reasonable accommodation.

In like manner, here Petitioner's problem was *not* Chrysler's Uniform Attendance Procedure. It was that, after hiring into Plant II, he simply lacked the seniority to hold the day shift, the only shift which quit work before the Sun.

In *Hardison*, this Court understood this. However a particular provision was labelled, the Court held that fellow employees cannot be made to pay for the religious accommodation of another through loss of their own competitive rights (typically tagged "seniority") under a negotiated labor agreement. The Court's language is broad, not because of confusion about the principle, but because care is always required when describing a factually diverse economy:

> We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. [*Hardison*, 432 U.S. at 79]

In the fifteen years since *Hardison*, federal courts have had to deal with factually specific issues of whether this or that accommodation was prohibited by the terms of a particular labor agreement. It comes as no surprise that sometimes it is, and sometimes it isn't. Here, a trial established that all accommodations, aside from the Un-

ion's suggested use of "floaters" or TPT's, would violate the seniority provisions.[14] We respectfully submit that such fact-specific inquiries are best left to the trial courts. If there is a split of the Circuits, none of the Circuits has mentioned it.

III. *DE MINIMUS* COST & RULE 52(a)

Finally, there is the issue of whether the use of a "floater" or TPT employee would impose more than a *de minimus* cost on Chrysler.

The short answer is that the trial Court heard the evidence, and found as a matter of fact that real costs were involved. The Eighth Circuit affirmed under F.R.Civ. Pro. 52(a).

These are fact findings of the most routine sort. The only point of mild scholarly interest are the divergent theories of cost accounting and, perhaps, economics. Petitioner requires a "billiard ball" economic causation, *i.e.*, there is no "cost" unless a particular replacement employee was hired and a fixed, temporal monetary cost assigned. The District Court adopted Chrysler's (unsurprising) approach that, if overall I need more people to make cars, and I must pay the same benefits on fewer productive hours, I've been economically injured. Even so, aside from theory, the District Court *did* put a number on the economic injury.

Interesting or not, this Court is hardly the place to resolve competing accounting theories, particularly when the

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[14] The "book" procedure is just another form of seniority. Seniority is, by definition, "first-come-first-served". It is a neutral way to making competitive decisions about allocation of scarce resources, here, time off on Friday. Sometimes the negotiators count the time on a corporate-wide basis, and sometimes on a plant-wide, department-wide, or classification-wide basis. Here, the signup book recorded just another form of seniority, measured by "time in the book", with all employees subject to the same rules.

solution depends on how economic life is lived in a particular industry.

Nor is there any reason to reach out to reexamine the meaning of *de minimus*. The use of a *de minimus* rule is what allowed this Court to avoid the First Amendment establishment issue in *Hardison*. If the required costs of accommodation are only *de minimus*, no justiciable constitutional controversy can arise. A revisitation of *Hardison* on the *de minimus* issue will only serve to resurrect a difficult and divisive First Amendment problem, which for the most part has lain at rest since *Hardison*.[15]

CONCLUSION

For the foregoing reasons, as well as those given by Chrysler, we respectfully ask the Court to *deny* the Writ.

Respectfully submitted,

MORRIS J. LEVIN
APPLETON, KRISTMAS,
LEVIN & BEATTY
8000 Maryland Ave.
Clayton, MO 63105
(314) 721-8685

JORDAN ROSSEN
General Counsel
M. JAY WHITMAN
(Counsel of Record)
Associate General Counsel
8000 East Jefferson Ave.
Detroit, MI 48214-2699
(313) 926-5216

Counsel for UAW Local 110

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[15] The exception is in the area of dues, *Wilson v. NLRB*, 920 F.2d 1282, 1290 (6th Cir. 1990) (striking down the "charity option" provision of the NLRA, § 19, 29 U.S.C. § 169, as an unconstitutional establishment).

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Appellant,
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CHRYSLER CORPORATION, a corporation, and LOCAL 110, UNITED AUTOMOBILE, AGRICULTURAL AND IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT CHRYSLER CORPORATION'S BRIEF IN OPPOSITION

PATRICIA L. COHEN
(Counsel of Record)
CHARLES M. POPLSTEIN
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

K. C. HORTOP
KIM KOLB
CHRYSLER CORPORATION
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-0176

Attorneys for Respondent Chrysler Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pp

QUESTIONS PRESENTED

1. Whether the Eighth Circuit held that Chrysler was not required to take steps inconsistent with non-seniority based provisions in an otherwise valid collective bargaining agreement to accommodate Petitioner's religious practices (regardless of whether such an accommodation would result in undue hardship), and thereby created a direct conflict among the circuits on an issue of special importance to the administration of justice and/or the public?

2. Whether the Eight Circuit held that the existence of an otherwise valid collective bargaining agreement containing a non-discriminatory seniority system or some other neutral method for scheduling may be deemed a substitute for the active effort by the employer to seek a reasonable accommodation of an employee's religious practices, and (regardless of the Eighth Circuit's holding that Cook's practices could not be accommodated without undue hardship) thereby created a direct conflict among the circuits or otherwise created a special and important reason for granting certiorari review?

3. Whether the Court should review this case to determine whether the lower courts must follow the EEOC Guidelines On Religious Discrimination in determining what constitutes *de minimis* cost and undue hardship, and to determine whether any costs incurred by the employer must be quantifiable?

4. Whether the Court should review the record and factual and legal findings of this case to determine if, as a matter of fact, Chrysler refused to use the same accommodation means for one Sabbatarian which were allegedly used for another Sabbatarian or were allegedly used for employees who seek a scheduling accommodation for a secular reason?

PARTIES TO THE PROCEEDING

The parties to this proceeding below were Jesse Cook, the petitioner, and the respondents Local 110 of the United Automobile, Aerospace And Agricultural Implement Workers of America (UAW) and Chrysler Corporation. Chrysler is a corporation whose shares are publicly-traded. Chrysler has no subsidiaries which are not wholly-owned except the folowing entities:

Acuflight, Inc.
American International Rent A Car
Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corporation, Ltd.
Big Sky of Montana Realty, Inc.
CFC/GECC (New York) Associates II
Chrysler Japan Sales Limited
City Rentals (Holdings) Limited
Eagle Associates
Ensambladora Carabobo, C.A.
Eurostar Gesellschaft m.b.H. & Co. KG
Eurostar Gesellschaft m.b.H.
F. F. Developments Limited
Flightform Limited
Genigraphics Corporation
Highland Park Development Corporation
Kingmill (Australia) Pty Limited
Lease-It Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Motor Club of America
Obsidian Livery, Inc.
OEM S.p.A.
Onset Bidco, Inc.
Phillips and Acustar Autoelectronics GmbH
Phillips and Acustar Autoelectronics, GmbH Co. KG
Pinnacle Partners

Rambler Motors (AMC) Limited
Rolls-Royce & Partners Finance Limited
Star Group IE Geothermal Partners
Star Group Stillwater Geothermal Partners
Synektron Corporation
Trico Marine Operators, Inc.
Valeo/Acustar Thermal Systems, Inc.
Wizor, Inc. of

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STATEMENT OF THE CASE

Cook's petition for certiorari portrays the facts of this case in a somewhat distorted and incomplete manner. The principal problem with Cook's version is that it fails to place the events in proper context or clearly identify the witnesses involved and their relationship to the events. The following discussion accordingly is presented to place the issues in proper context and provide the Court with a clearer understanding of the underlying facts and the difficulties involved with Cook's request for accommodation. Chrysler also refers the Court to the detailed factual findings in the District Court's opinion, which provide a far more complete and accurate portrayal of the facts than Cook suggests.

Chrysler

At all relevant times during this case, Chrysler operated two separate vehicle assembly plants in St. Louis, Missouri—St. Louis Assembly Plant I and St. Louis Assembly Plant II (which opened in 1983 and employs approximately 3,200 production workers). Chrysler's Appendix ("SA") 242, 251, 460. The production and maintenance workers at each plant were represented by the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (UAW) (the "UAW" or the "Union") but each plant was represented by a different local of the Union. A. 18. Local 110 of the UAW represents the production workers at Plant II. SA 213.

Chrysler and the UAW

Chrysler and the Union are parties to a national collective bargaining agreement which governs the terms and conditions of employment for production workers at all of Chrysler's U.S. plants, including St. Louis Assembly Plants I and II. A. 39-89. At each plant, the Na-

tional Agreement is supplemented by a local agreement between Chrysler and the UAW local representing employees at that plant. A. 90-119. Under the agreements, seniority is on a plant-by-plant basis, and seniority at a plant prevails over corporate seniority. A. 39-119. Within Plant II, seniority is on a departmental basis. A. 94-95. Seniority at St. Louis Plant II determines shift preference, vacation preference, job assignments, and many other matters. A. 98-99, SA 201, 231-232. As one witness testified, "Seniority is everything." SA 231-232.

The National Agreement is based upon and geared to a two (2) shift production schedule. A. 72, 39-89, SA 93-94. Chrysler cannot change the work schedule without the Union's approval. SA 333-334, 345, 347, 683. This was demonstrated in 1989, when Chrysler asked Local 110 to vote to negotiate over a new work schedule at Plant II. SA 209-211. There is no evidence or proof whatsoever that the National Agreement or the Local Agreement, or any of their provisions, in any way were designed or intended to discriminate against Sabbatarians or any religion.

The National Agreement contains certain provisions which are of importance to this case, specifically:

1. *A negotiated no fault absenteeism policy, known as the Uniform Attendance Procedure.* This program was instituted in 1983 pursuant to an agreement between Chrysler and the UAW that absenteeism adversely affects quality and costs of production. A. 81-86, 164-171. The Uniform Attendance Procedure deals with absenteeism in two respects: (1) a six step procedure and (2) a chronic absentee procedure. This negotiated document speak to the problem of absenteeism and its effect on productivity:

> During these negotiations, the subject of absenteeism was examined at great length and in great detail. The parties agreed that absenteeism results

> in additional operating costs, adversely affects the efficiency of operations and quality, and places an unfair burden on those employees who regularly work as scheduled. A 81.
>
> * * * *
>
> As a UAW worker, you know what happens when people don't report for work. Production schedules are disrupted, an extra burden is placed on the dependable people who don't miss work, and the scurry to cover for absent employees has a negative effect. Even if absent workers are not paid wages for the days missed, a provision must be made to have someone cover their job. This may involve overtime and actually cost more than regular wages. Plus, any time people are shuffled around to cover absences, they resent having to leave their normal job and there is bound to be some loss of efficiency, and that costs money in the long run. More important, absenteeism undermines Chrysler' ability to compete with other auto makers, both domestic and foreign, and endangers the recovery Chrysler and the UAW lobbied so hard for and worked so strenuously to assure. . . . Your union contracts have been designed to provide you with vacation time, as well as ample time off for most needs and emergencies. A. 165.

Under the six step Uniform Attendance Procedure ("UAP"), employees who are absent seven times in a six month period, whether excused or unexcused, receive a written warning. Thereafter, each unexcused absence within a six (6) month period results in increasing levels of discipline ending in discharge (Step 2—written warning, Step 3—5 day layoff, Step 4—15 day layoff, Step 5—30 day layoff, Step 6—discharge). A. 83-84, 166-179.

The Uniform Attendance Procedure also contains a Chronic Absentee Procedure. Under this procedure, essentially any employee who is absent more than 20% of the time during the *regular* work week (Monday-Friday), regardless of whether the absence is *excused* or *unex-*

cused, is subject to discipline. If this level of absenteeism continues, the procedure calls for the employee's discharge. A. 84-86, 169-171. The National Agreement specifically notes in this regard that for employees with such a record, "it is agreed their irregular attendance prevents them from fulfilling the purpose for which they were hired, that is, as full-time employees. The parties agree that since such employees are unable to fulfill their obligation of regularly working as scheduled, their employment may be terminated under certain circumstances." A. 84. The discipline called for under the Uniform Attendance Procedure is negotiated, and (except for a 5 day disciplinary layoff) cannot be waived. A. 83-84. In fact, no provisions of the national or local agreement may be varied without the Union's consent. SA 636a-b.

2. *Specific provisions dealing with transfers between assembly plants within a specific geographic range of each other.* A. 63. The most pertinent provision deals with a procedure called "work opportunity." Under that procedure, if, for example, an employee is on layoff at Plant I and Plant II has positions available, the positions must be offered to laid off Plant I workers according to their seniority. A laid-off employee is given the option of taking the job—in which case he or she starts at Plant II with zero Plant II seniority, or refusing the offer —in which case the employee remains on layoff (with their Plant I seniority) awaiting recall at Plant I, but loses any right to continued unemployment benefits under the labor agreement. A. 63, SA 466-471. Surprisingly, in practice many workers at Plant I turn down this opportunity to work. Approximately 50-65% of Plant I workers rejected the chance to work at Plant II according to the testimony at trial. SA 468.

3. *A six step grievance and arbitration procedure culminating in arbitration before a neutral arbitrator.* A. 47-53, 87. The final step before arbitration is an Appeal Board, consisting of two representatives from the UAW

and two representatives from Chrysler. A. 49-50. At this step, Chrysler and the Union meet to discuss the grievance and their respective positions. It is the Union's grievance and therefore it is incumbent on the Union to pursue the grievance or propose changes. If the Union does not agree with Chrysler's position, it can proceed to arbitration or withdraw the grievance. The choice in either case is with the Union alone. SA 681.

Chrsyler Plant II

Chrysler opened St. Louis Assembly Plant II in the fall of 1983. SA 242, 251, 460. Beginning in late 1986 and since that time, the Plant produces the mini-van, the Company's most popular vehicle. SA 210, 463-464.

At Plant II, the Production Department ("Production"), including its Area Manager (John McFarland) and Line Supervisor (Robert Brinkley), is responsible for building and producing vehicles. SA 76-78, 463.

There are a number of different types of workers employed in Production at Plant II. Once a worker is assigned a job, he or she holds that job until electing to move elsewhere. Jobs are filled generally by seniority in practice. Production workers are assigned jobs at separate stations on the assembly line, where the employee performs certain designated tasks within less than one minute. For the vehicles to be built, someone must be at each station performing that job the entire time the line is running.

In addition to the workers on the assembly line, Chrysler also employs repairmen. These employees are assigned to a section of the line. Their job is to finish any job not completed by someone in the section, and to find and repair any defects in the work performed in that section.

Absences essentially are covered in one of two ways—floaters or temporary part time workers (TPTs). Floaters

are full-time production workers who work the same work schedule as regular production workers. They will fill-in for a worker when he or she is absent from the job. This may be for an entire day or for a short period, when for example the employee is using the restroom, seeing the doctor, or speaking to his or her Union representative. The number of floaters employed is based upon the levels of absenteeism experienced by Chrysler. SA 228, 480-483. The amount of manpower the Plant may authorize for a particular day is based upon job requirements and projected absenteeism. Thus, the number of people the Plant may call in for a particular day is based in part upon projected absences. SA 477-479. (The District Court found, as a matter of fact, that Chrysler would have to hire another full-time floater if a floater had been used to cover Cook's Friday absences on a regular basis. *Cook v. Chrysler Corp.*, 779 F. Supp 1016, 1021 (S.D. Mo. 1991)).

The labor contract also allows Chrysler to employ workers on a temporary basis ("TPTs") to handle absences on Monday or Friday, provided the worker does not work more than 120 days. These workers are paid the basic wage rate but receive no benefits. TPTs only may work on Monday or Friday. SA 228-229.

Labor Relations is a support function for Production. Labor Relations handles all contractual and equal employment matters for Production. SA 75-80, 462-463. For example, Labor Relations responds to all grievances. The Production supervisor merely accepts the grievance and delivers Chrysler's response as prepared by Labor Relations. SA 367-370, 191-209. Likewise, Labor Relations advises Production on discharge and disciplinary matters. SA 191-196. Discipline of employees was determined by Labor Relations, not the Supervisors. A. 613, 619. Despite Cook's implications to the contrary, it is clear that Labor Relations and not Production Super-

visors or Area Managers were responsible for handling this type of a personnel matter.

Although it may be difficult to believe in this economic climate, absenteeism was a significant problem at Plant II during the relevant time period. The workforce was relatively young and employees wanted time off. SA 474-476. From the time the Plant opened, Chrysler operated two shifts. With only occasional breaks, production workers were scheduled to work 9 or 10 hour days, 6 days per week, for the maximum period allowed by the National Agreement. With the Plant working a 6 day, 9-10 hour shift for a number of years, time off became even more valuable. As time went by, this steady overtime generated growing levels of absenteeism. SA 586-589, 608-610.

With the 1985 local contract, the number of job categories increased significantly, thereby reducing management flexibility to transfer workers and making absenteeism a greater problem. SA 224-225, 586-589, 608-610. In November, 1985, the local labor agreement was changed to provide a mechanism for employees, 30 days in advance of a scheduled work day, to sign up in a book (the "Book Procedure") on a first come, first serve basis for an excused day off. A. 180. The number of open slots each day per shift and department was negotiated, and the Union required that no employee abuse the procedure to the detriment of others. This was designed to avoid favoritism and give all workers an equal chance to obtain favored days off. SA 227, 641-643. Prior to that time, days off were granted by management in its discretion. This generated complaints of favoritism by employees, and the Book Procedure resulted to deal with this issue. The Book fills up fast on a Friday night. SA 626.

According to a number of witnesses, the absenteeism problem at Plant II was at its worst on Friday night. *E.g.*, SA 17-19, 475-476. Absenteeism on Friday night

was so bad that management often pulled all repairmen and other available workers (including supervisors) from regular jobs and brought in temporary workers to get the line started. SA 375-378. Often the line did not start on time. SA 480-487.

On Friday nights, the Plant called in a certain number of TPTs based upon its best projections for absenteeism. TPTs are hired simply by contacting by telephone people who have previously signed up on a call list, to see if they will work that evening. SA 475-487. If the person is not at home or declines to work, the next person is called until there is an appropriate complement hired for the day. SA 483-486. Openings on the line are filled first by floaters—who are assigned to the most difficult or error-prone of the open jobs—and the balance of the jobs are filled with TPTs. SA 375-378.

Cook and Chrysler

Cook started working for Chrysler in 1977 at Plant I. While on layoff in 1978, he took work opportunity to transfer to Plant II. III 8. When that plant had a layoff in 1979, Cook returned to work at Plant I. III 8. If he had not returned to Plant I, Cook would have had one of the highest seniority dates in Plant II. SA 20-22, 490-492.

Cook worked at Plant I until a major layoff in 1980 and was not recalled to work at Plant I until 1983. He worked at Plant I until his layoff in October 1985. SA 20-22, 490-492, A. 189-196.

Shortly *before* his 1985 layoff, Cook became a member of the Seventh-Day Adventist Church. He began to miss Friday nights. His absences were listed as unexcused, and he was at Step 1 of the Uniform Attendance Procedure when the layoff occurred. A. 189-196.

In January 1986, Cook received notice under the work opportunity procedure of the National Agreement that openings existed at Plant II, and that he could elect to

work at Plant II or remain on layoff and retain his Plant I seniority. Cook elected to report for work at Plant II knowing full well he lacked the seniority to work the first shift and therefore would be placed on second shift, missing every Friday night and facing discharge. A. 196-197, SA 55-56. By taking work opportunity, rather than remaining on layoff, Cook effectively exacerbated his scheduling problem, because he had no seniority at Plant II.

Cook reported for work and was placed on the second shift by virtue of his seniority. By virtue of his lack of seniority, he was assigned the line job of installing the jack and spare tire in the trunk of the vehicle. This was the only open job available in the section at that time. SA 372-374, 378. As with other jobs in the section, the job had to be completed properly in approximately 1 minute. SA 379-381. The other jobs in the section were held by production workers with greater seniority than Cook. SA 372-374.

Upon reporting, Cook advised Chrysler of his need to be off Friday night for religious reasons and gave management a letter requesting accommodation. Cook's immediate supervisor was Robert Brinkley, who in turn reported to area manager John McFarland. When Cook reported to Brinkley on second shift he gave Chrysler the same written letter requesting accommodation. Brinkley gave the letter to his Area Manager (McFarland) who in turn gave it to Labor Relations. Brinkley also referred Cook to his Union Steward for assistance and spoke to the Union Steward concerning Cook's situation. SA 384-385. The matter thereafter was handled by Labor Relations—specifically Labor Relations Supervisor Thomas Kallaos ("Kallaos")—and the Union.

After reporting, Cook began to miss work every Friday night. When he reached Step 2 in the Uniform Attendance Procedure (the last step before time off is assessed), Chrysler suspended any further discipline for over two months while it considered how to address the

accommodation request, even though Cook continued to miss work every Friday. SA 13, 285-287, 300-302.

Chrysler investigated Cook's request and attempted to explore alternatives. Kallaos considered the possibilities suggested by Cook and did not find any of them to be realistic or feasible. SA 301, 261-269, 289. He saw the only way to deal with the scheduling problem and still have Cook work the required hours like everyone else was for Cook to work first shift.

Kallaos investigated the seniority situation and found Cook could not hold first shift with his seniority. SA 273-274. As a practical matter, even at the time of trial over 3 years later, a person with Cook's seniority date lacked the seniority to hold first shift. SA 303-304, 497-504.

In his investigation, Kallaos also learned there were two other Seventh-Day Adventists at Plant II who had sufficient seniority to work the first shift. SA 276-277. These two workers were excused from working on Saturday, which is a premium pay day and therefore a day when absenteeism is not as serious a problem. SA 276-277.

Kallaos then spoke with Chrysler's EEO officer, Reggie Crocker ("Crocker"), in Detroit. Crocker advised Kallaos that Chrysler could not excuse Cook from work every Friday night and that he should determine if Cook could hold first shift. Failing that, Crocker suggested he ask the Union to allow Cook to work first shift. According to Crocker, at another Chrysler plant he had placed a Seventh-Day Adventist on the first shift unilaterally and that Union local had not objected. SA 275-282.

At Crocker's instruction, Kallaos then asked the Union President, Donald Woemmel ("Woemmel"), to allow Cook to work the first shift out of line of seniority. Woemmel flatly refused the request. A. 181, SA 328-329, 521-522. Kallaos then approached the Union's serv-

icing representative, Richard Burton, with this same request. A. 181. Burton also rejected the request. SA 181, 329.

Chrysler then advised Cook it would not excuse his Friday night absences, and that such an absence for religious reasons would be treated like any other *unexcused* absence. A. 132, SA 290. However, Chrysler allowed Cook to report to work late after sundown on Saturday night (an overtime shift when absenteeism is not as much of a problem). In essence, Chrysler permitted Cook to report to work late on Saturday night, but was unable to excuse his absences on Friday night. SA 275-282.

Cook continued to miss work. On Friday nights when Cook missed there were additional repairs on his regular job and the repairmen complained about the slow work and additional repairs. Jobs at his station either were not performed at all or not performed properly. Brinkley even fired one TPT who worked that job for poor performance. In addition, other workers told Brinkley that if Cook was getting off work Friday night, they wanted Friday nights off also. SA 382-384, 389. Thus, even though there may not have been any direct, provable "production loss" (i.e., a failure to produce *a* car in whatever shape) as a result of Cook's absences, there consequently were actual additional repairs and productivity problems on the job in question.

As he continued to miss work on Friday night, Cook's absences were treated like any other unexcused absence, and he was assessed discipline according to the Uniform Attendance Procedure. A. 172-179. Cook was able to use the Book Procedure to excuse more than one absence. A. 104; A. 126-127. His unexcused absences ultimately resulted in his discharge on September 18, 1986. A. 179.

The Union filed a grievance each time Chrysler imposed discipline against Cook pursuant to the Uniform Attendance Procedure. The Union and Chrysler addressed Cook's problem at each step of the grievance

procedure. SA 174-175.[1] Chrysler also discussed Cook's situation with a representative of the Adventist Church in an effort to resolve the matter, to no avail. At that meeting, the focus by the Church was on finding a way for Cook to hold first shift, not on any other type of accommodation. SA 176-180, 347-348.

The grievance proceeded to the Appeal Board level. The Union requested that Chrysler excuse Cook every Friday night and replace him with a floater (thereby adding another Union worker to the payroll). Chrysler did not accept this proposal. The Union then withdrew the grievance and declined to take it to arbitration. A. 38. According to the Union Appeal Board representative, John Guinan, he withdrew the grievance because he found no violation of the Uniform Attendance Procedure. Guinan Depo. at 45.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

This is a straight-forward, fact-sensitive Title VII religious accommodation case which was decided by applying the statute and the Court's decision in *TWA v. Hardison* to the particular facts of this case. The District Court's factual determinations were affirmed on appeal. Both the District Court and Eighth Circuit decisions are consistent with *Hardison* and the applicable provisions of Title VII.

The petition represents little more than an attempt to obtain a second review of the factual determinations made below. The case has little application beyond its

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[1] This was consistent with the typical practice between the Union and Chrysler for employee discipline, as opposed to addressing the issues (as Cook suggests) at the time discipline was imposed by Chrysler. Cook's attempt to fault Chrysler for allegedly not discussing the accommodation question when discipline was imposed is misplaced since Cook had Union representation, and the grievance procedure is where such issues are discussed. Cook testified that he understood the Union was supposed to represent him and to communicate with Chrysler on the issue. A. 238.

particular facts. The lower courts appear to have little trouble applying *Hardison* or Title VII's religious accommodation provisions. Deciding the issues raised here by Petitioner will provide little guidance above and beyond that provided in *Hardison*. Resolving the issues will have little effect on the administration of justice as a whole because the case is so fact-sensitive.

The decisions below are not inconsistent with *Hardison*. The circuit "conflicts" alleged are more theoretical than actual. They are based upon language from decisions which are factually unrelated or factually distinguishable. Resolving the "conflicts" will not affect the outcome of the case in any event because the decisions also are based upon a factual finding of undue hardship. Conflicts between EEOC Guidelines and a Circuit Court decision are not a basis for certiorari review. Petitioner's factual arguments regarding disparate treatment are unfounded, and do not constitute special and important reasons for review.

REASONS FOR DENYING THE WRIT

Introduction

This is a simple, straightforward Title VII case. It was decided on the application of Title VII's religious accommodation provisions—as interpreted by this Court in *TWA v. Hardison*, 432 U.S. 63 (1977)—to the specific facts of the case. The District Court, applying *Hardison*, found as a matter of fact that Chrysler could not accommodate Petitioner without undue hardship and without incurring more than a *de minimis* cost. The Court of Appeals, applying *Hadison*, declined to overturn the District Court's factual findings.

Pared to their essential core, Petitioner's arguments are nothing more than an attempt to convince the Court that the lower courts wrongly decided the case on the facts and that a second review is warranted. However, that is not a proper basis for granting certiorari.

Certiorari jurisdiction is not for the purpose of giving the defeated party a second review of the district court's decision. Something more than just mere error must be alleged. Under the Court's Rules, "special and important reasons" are required to grant a petition for certiorari. Sup. Ct. R. 10. The Court does not "sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1954) (citations omitted). Clearly, a case must involve issues of importance to the public or the administration of justice; as opposed to just the actual litigants.

As the following discussion explains, this case does not merit review based on the arguments raised by Petitioner. The Court of Appeals and the District Court applied Title VII's provisions to the peculiar facts of this case in accordance and consistent with the teachings of *Hardison*. Such factual decisions do not warrant further review. However, on even more basic grounds, the case is not suitable for certiorari review. In the 18 plus years since the *Hardison* decision the lower courts have successfully applied *Hardison* to a multitude of fact-sensitive cases. Since then, only in *Ansonia Board of Education v. Philbrook*, 470 U.S. 564 (1985), has the Court had occasion to look again in detail at the application of Title VII's religious accommodation provisions.

This case is no different than the dozens of other fact sensitive religious accommodation cases which have been decided in the lower courts since *Hardison*. It has little application or importance beyond the peculiar fact situation which exists in the Chrysler vehicle assembly plants. Resolving the "conflicts" and "errors" alleged will have little effect on the public (or even Sabbatarians) as a whole, since the case is so fact-sensitive. While clearly important to Petitioner and possibly of interest to other Sabbatarians who work for a union operation, deciding the issues raised here will provide little guidance beyond

that provided in *Hardison* and contribute little to the ability of the lower courts to interpret and apply Title VII, *Hardison* and *Ansonia*. For this reason alone, the petition for certiorari should be denied.

I. THE COURT OF APPEALS AND DISTRICT COURT DECISIONS ARE CONSISTENT WITH THE TEACHINGS OF HARDISON AND DO NOT CREATE ANY REAL OR DIRECT CONFLICT BETWEEN THE CIRCUITS.

In a transparent effort to secure another factual review of the district court's decision, Petitioner goes to great lengths in an effort to convince the Court the decisions below in this case are inconsistent with *Hardison* and have created a direct and real conflict between the circuits. In fact, this is far from the case. Any "conflict" is far more imagined than real, and resolving the "conflict" will not ultimately affect the outcome of the case.

A. The Court of Appeals and District Court Decisions Are In Accord with Hardison.

This case involves the application of the religious accommodation provisions of Title VII to the highly structured production environment of a unionized employer whose labor agreements cover virtually every aspect of production, scheduling, and employment. In this case, the labor agreements limited the flexibility and options to deal with a problem such as Cook's.

The Court of Appeals' and District Court decisions recognized and properly applied the principles developed by the Court in *Hardison* and its progeny. In *Hardison*, the Court found for the employer where the Sabbatarian employee lacked the seniority to work a shift which would not conflict with his religion, and the Union refused to allow him to work a shift out of line with seniority. In so holding, the *Hardison* Court refused to require TWA to "take steps inconsistent with the otherwise valid [collective bargaining] agreements." *Id.* at 79. According to the *Hardison* Court, "absent a discriminatory purpose,

the operation of a seniority system cannot be an unlawful employment practice, even if the system has some discriminatory consequences." *Id.* at 63. The Court also said:

> [T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on limiting discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities . . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, *as well as deprive them of their contractual rights,* in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Id. at 82 (emphasis added).

The *Hardison* Court further held that requiring "TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. In so holding, the Court specifically rejected the Eighth Circuit's suggestions that (a) Hardison be allowed to work a four day week while others worked five days, and (b) Hardison be replaced with a supervisor or a qualified person from another department. *Id.* at 84. The *Hardison* Court noted that "[b]oth of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages." *Id.* at 84. The Court also noted that

> [b]y suggesting that TWA should incur certain costs in order to give Hardison Saturdays off, the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the

> employee who will enjoy it on the basis of his religious beliefs. While incurring extra cost to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

Id. at 84-85.

In his treatise on employment discrimination, Professor Larson likewise stresses that the interest of co-workers in not being discriminated against "on grounds that were ultimately religious" is a key factor to the *Hardison* decision. Otherwise, he suggests, accommodating Hardison at more than a de minimis cost would mean TWA would pay a cost for Hardison to take a day off which it would not pay for another worker. 3 A. Larson, *Employment Discrimination* § 92.12(a)-(b) p. 19-37 (1992).

Hardison provides clear guidelines for resolving religious accommodation cases that are just as relevant today as they were over 18 years ago. Contrary to Cook's suggestion to the Court, the District Court did nothing more than apply *Hardison* to the particular facts of this case. From a careful reading of the opinion, it is clear the District Court found, as a matter of fact and law, that (1) accommodating Cook's request to miss work every Friday night by moving him to the first shift out of line with his seniority and without the Union's consent was not required by *Hardison*, and (2) accommodating in any other manner Cook's request to miss work every Friday night would cause undue hardship for Chrysler, including lost efficiency and quality, and additional costs which were more than *de minimis*. *Cook*, 779 F. Supp. at 1023-1024. On appeal, the Eighth Circuit refused to overturn, as clearly erroneous, the District Court's conclusion that accommodating Cook would result in more than a *de minimis* cost to Chrysler. The Court also stated that accommodating Cook would compromise other employees' contractual rights. *Cook v. Chrysler Corp.*, 981 F.2d 336, 338-339 (8th Cir. 1992).

Neither decision is inconsistent with the teachings of *Hardison* outlined above. Under *Hardison*, employers do not have to allow the employee to work only 4 days a week when everyone else is working 5 days a week if this would result in additional costs or lost efficiency. This is essentially what Cook asked for in this case—to work 5 days out of 6 and be replaced by someone else on Friday night—since Chrysler does not run the assembly line on Sundays and the only Sunday work is in high seniority jobs at premium rates. However, the District Court found as a factual matter that allowing Cook to work a different schedule and fewer days than the 3,000 other workers at Plant II (including a prized day off every Friday) would result in additional costs and lost efficiency to Chrysler. This included the $1,578 cost of benefits lost yearly by Cook missing one day per week, the more than $5,000 in plant costs per employee lost yearly by a Plant II worker missing one day per week, the costs of additional repairs and warranty claims from absenteeism, the cost of hiring a TPT and/or additional floater, and loss of quality and efficiency. The Court of Appeals reviewed this finding and refused to overturn it. A further explanation of the underlying facts would be helpful to understand these rulings.

At Plant II, "Seniority is everything" for a production worker. SA 231-232. It determines shift, vacation, job, layoff, etc. Any exception to the contract condoned by Chrysler is used by the Union to secure the same advantage for others. SA 621-623, 645, 665.

Cook's accommodation request placed Chrysler in an untenable position. The scheduling system was based upon a five day work week, with a day and evening shift. All the labor agreements were based upon and geared to a two-shift operation and starting times and quitting times for shifts are spelled out in the National Agreement. SA 205, 33,334, 345-347, 656. Shifts and schedules could not be changed without Union agreement. Shift preference

was based solely upon seniority. A. 98-99. The same benefits were paid regardless of how many hours were worked. A. 183 (Woemmel). Since benefits were set regardless of whether the employee worked 40 or more hours, it clearly was more economical for Chrysler to work an employee up to the maximum hours allowed by contract. Chrysler lost that efficiency when an employee did not regularly work the full schedule. To make matters worse, Friday night was a prized day off for employees. SA 626. Employees became angry if someone got off on Friday night more than others. SA 667.

The alternatives proposed by Cook in his January 17, 1986 letters were not feasible. A. 162. The work schedule could not be varied except by agreement. SA 210-11, 345, 347. Placing Cook on the first shift out of line of seniority violated the seniority rights of other workers. Voluntarily swapping shifts also would not work. Employees do not own their seniority, and cannot trade it as they see fit. An employee can displace anyone (even Cook, if he were on first shift) on the first shift, even for one night, if he has greater seniority than that person. SA 265, 634, 654.

Excusing Cook every Friday night similarly would contravene the labor agreement, which generally calls for the discharge of an employee who is absent 20% or more of the time (with certain exceptions for non-recurring situations), whether excused or unexcused. A. 84-86, 169-171. A 20% absenteeism rate is equivalent to missing one shift per week. Numerous other employees have lost their jobs for missing the same amount of time as Cook would have missed if he were excused. SA 668-673.

The type of routine excused absence contemplated by Cook's situation is a far cry from a casual absence, which Cook uses to justify excusing him also. Examples of excused absences cited by Cook—such as illness, workers compensation, jury duty, union business, etc.—all deal with situations which are non-recurring or non-permanent types of absences. They also do not raise

Establishment Clause concerns. Cook's request, however, was a request to be excused *every* Friday night on a permanent, ongoing basis. It therefore cannot be equated with a casual type absence.

Excusing Cook every Friday night also essentially creates another allowed slot for the Book above that negotiated. The Book Procedure operates on a first come, first serve basis. The number of slots available for any day is limited, and no employee can routinely sign up for the same day off. A. 180. This latter limitation was added to the contract to avoid favoritism and ensure that *all* employees had a chance at getting preferred days off. SA 616, a, b, 639-640. Thus, when the Book Procedure took effect in November 1985 (A. 180), Chrysler no longer could favor the request of any one employee. Instead, all employees received equal treatment. To allow Cook to be excused every Friday night therefore would directly conflict with the Union's request that prized days off—and Friday night clearly was such a time—be allocated equally.

Given these facts, it becomes readily apparent that to excuse Cook every Friday night would contravene the applicable labor agreements and give Cook a benefit not accorded to any other production worker. Moreover, it would allow Cook to work less than the regular schedule for his fellow workers—a result *Hardison* squarely rejected when it refused to allow Hardison to work a 4 day rather than a 5 day week as the appellate court had suggested.

Since the evidence showed that numerous other employees wanted Friday night off, this was a likely problem—another concern recognized in *Hardison*. *E.g.*, SA 626, 648. Essentially, Cook would be able to miss work at a level of absenteeism which would result in discharge for any other worker. As *Hardison* clearly states, such unequal treatment is not required by Title VII, and indeed contradicts the statute's intent. Rather than serving as a shield from Title VII, the collective bargaining agree-

ments merely ensured equal treatment based on neutral criteria and set the parameters for the costs which must be incurred. However, an organized employer should not be condemned for being unaccommodating (or treated like a non-Union employer with considerable discretion), just because the labor contract has restricted his options.

Consequently, it is readily apparent that the courts below were faced with a factual situation similar to *Hardison* and applied *Hardison* to those particular facts. The holdings are entirely in accord with *Hardison*.

B. Any Alleged "Conflict" Between The Circuits Will Not Affect The Outcome.

In his quest for a cert-worthy conflict, Petitioner searched in detail the opinions below and those from other circuits for some common theme. The alleged conflicts produced from this search appear to be: (1) whether the existence of a labor contract excuses the employer from engaging in an accommodation effort, (2) whether a non-discriminatory labor contract itself constitutes a reasonable accommodation, and (3) whether all, or only seniority, provisions of a labor contract can be used as a shield against a religious accommodation request. Petitioner's Brief 11-21.

In pressing these arguments, Petitioner conveniently fails to point out a fundamental fact—the effect the Court's resolution of these issues will have on the outcome of this case.

In fact, resolving these questions raised by Petitioner will not effect the outcome at all. These questions do not in any way address the District Court's finding, as upheld by the Court of Appeals, that excusing Cook every Friday night would result in more than a *de minimis* cost to Chrysler. That finding is determinative for the entire case. It is one of the two bases upon which the Eighth Circuit distinguished one of its prior decisions. Petitioner's arguments only deal with the other distinction.

This is clear from the Eighth Circuit's opinion. In that opinion, the Court of Appeals first held that under its opinion in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979), "differential treatment resulting from accommodation runs afoul of section 2000(e)-2(a)(1) if it 1) compromises other employees' seniority rights as secured by a collective bargaining agreement, or 2) confers a privilege, the cost of which is more than *de minimis*, solely on the basis of the recipient's religious beliefs." *Cook v. Chrysler Corp.*, 981 F.2d 336, 338 (8th Cir. 1992). The *Cook* Court then proceeded to explain how both of these situations apply—contract rights and *de minimis* costs. Petitioner's "conflicts" do not in any way deal with the latter issue. Consequently, even if the Court were to resolve the "conflict" issues in Cook's favor, the decision would still stand.

C. The Decisions Below Are Not In Direct Conflict With Other Circuit Decisions.

Try as he might, Cook's quest to create a conflict based on the issues cited in II above does not create a direct, as opposed to a probable, conflict of any substantial importance, much less one which is worthy of review. There are several reasons for this:

1. Hardison states very clearly that an employer is not required to take steps "inconsistent with" an otherwise valid collective bargaining agreement. *Id.* at 79. There is no question that the collective bargaining agreements at issue were not intended or designed with a purpose to discriminate against Sabbatarians or other religious groups. Accordingly, *Hardison* teaches that Title VII does not require the employer to act inconsistently with the agreements, particularly if it would result in more than a *de minimis* cost—which is the case here. Clearly, the decisions below are entirely in accord with this conclusion.

2. The alleged conflict between the Eighth Circuit decision in this case and the Fourth Circuit's decision in

EEOC v. Ithaca Industries, Inc., 849 F.2d 116 (4th Cir. 1988) is illusory. *Ithaca* does not on its face appear at all to deal with the accommodation issue in a unionized setting. There is no evidence a collective bargaining agreement was involved, that a labor agreement precluded accommodation, or that Ithaca was in any way precluded from working out an accommodation. The *Ithaca* Court clearly did not decide the same issue which is in dispute here. The two cases are thus clearly factually distinguishable and cannot be considered as creating a direct conflict on an identical issue.

3. *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), likewise does not appear to be in direct conflict with the decisions below. Once again, there is nothing in the opinion to indicate that Smith was a union employee governed by a collective bargaining agreement which restricted his employer's flexibility in dealing with the situation. The case appears to only involve a self-imposed company policy. Pyro allowed for voluntary swaps, whereas the labor contract in this case did not authorize persons to swap shifts and gave every worker the right to work a shift, even for a day, instead of a worker with lower seniority. Unlike *Cook*, there also was a finding that *Pyro* failed to prove accommodation would pose an undue hardship.

4. Cook exaggerates the nature and impact of the Court of Appeals' conclusion that the labor contracts provide a reasonable accommodation. The language cited by Petitioner from *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 674 (8th Cir. 1985), is mere dicta. The Court of Appeals in *Cook* merely said that the labor contracts—which provide for shift and vacation preference based upon seniority, allow each employee a certain number of days off, and allow employees to sign up for time off on a first come, first served basis without reference to seniority—provided *an* accommodation of Cook's beliefs. 981 F.2d at 339. The *Cook* Court nowhere, said it was the sole accommodation necessary. Indeed, Petitioner

recognizes his construction of the Eighth Circuit's opinion is one of "implication." Petitioner's Brief at 18. Not only is this "implication" several steps afield from the Court's actual opinion, but such implications do not rise to the level of a direct and clear conflict.

5. What Cook is really trying to say is that Title VII requires an employer to actively attempt to accommodate an employee with a religious scheduling problem, and if he fails to do so, a Title VII violation occurs even if the employer proves undue hardship. This strained construction of Title VII is not consistent with the language of the statute, or *Hardison* and *Ansonia*.

6. Petitioner cites several cases for the proposition that *Hardison's* application is limited to seniority provisions of a collective bargaining agreement and that an employer may not rely on non-seniority provisions of a labor contract to excuse a failure to accommodate. Petitioner's Brief at 15. He then claims the Eighth Circuit's decision below is in conflict with this construction. Once again, the cases he cites are inopposite. The decisions cited deal with an employee's refusal to pay union dues and the union's refusal to waive the union seniority clause in a labor contract to accommodate the refusal. The cases do not involve an employee scheduling problem. None of the defendants in those cases were able to prove undue hardship. The issues are entirely different because the costs and implications associated with these different accommodation questions are entirely different. These decisions hardly are in direct conflict with the ruling in this case on a different issue and set of facts.

* * * *

Petitioner has blown the Eighth Circuit's reference to collective bargaining agreements totally out of proportion. The Court below merely held that Chrysler did not have to take steps inconsistent with an otherwise valid collective bargaining agreement to accommodate Cook. That is entirely consistent with *Hardison*.

II. ALLEGED CONFLICTS BETWEEN A CIRCUIT COURT DECISION AND EEOC GUIDELINES DO NOT PROVIDE A BASIS FOR CERTIORARI REVIEW.

Petitioner appears to argue that the Courts below failed to follow the EEOC's Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1-1605.3, by not looking at the relative cost to Chrysler of accommodation and/or requiring Chrysler to show the magnitude of the hardship.

The Court did not give these Guidelines the force of law in *Ansonia*. In fact, the Court noted in *Ansonia* that "EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the weight of law." 479 U.S. at 69 n.6.

Such a conflict is not a recognizable basis for certiorari review. Supreme Court review is not necessary to resolve conflicts between EEOC "Guidelines"—which are not administrative regulations authorized by Congress—and a litigated decision by a Circuit Court of Appeal. This is particularly true since the Guidelines are not binding precedent on any party.

In any event, the Guidelines cannot be squared with *Hardison*. TWA was no less a large employer than Chrysler, yet paying premium wages to one employee was considered more than a *de minimis* cost. *Hardison* does not limit *de minimis* costs to premium wages. The costs of accommodation cited by Chrysler were proven specifically in part—$1,578 in lost benefits per year, over $5,000 in lost plant costs per year—and were certainly as signicant as in *Hardison*. Moreover, in addition to *de minimis* costs, *Hardison* spoke of "lost efficiency" without requiring any quantification. 432 U.S. at 84. Here, Chrysler demonstrated lost efficiency and quality. Apparently, Petitioner would require Chrysler to lose significant dollars in relation to its net worth, before finding undue hardship. The *de minimis* cost ruling of *Hardison*

—clearly issued with an eye to constitutional establishment clause concerns—requires no such proof. Indeed, the statute itself requires no proof of quantifiable undue hardship in monetary terms.

III. COOK'S FACTUAL ARGUMENTS REGARDING THE ALLEGED ACCOMMODATION OF ANOTHER SABBATARIAN AND EXCUSING CASUAL ABSENCES PROVIDES NO BASIS FOR CERTIORARI REVIEW.

In a final effort to secure Court review, Petitioner abandons all pretense of reliance on the standards and rules for certiorari review and launches into a wholesale discussion of the facts of the case; particularly the types of absences Chrysler excuses and the alleged accommodation of another Adventist. Even though this incursion into the facts is ample proof that no basis for certiorari review is presented, some response is necessary to preserve the record.

Cook mistakenly relies on the paid absence allowances ("PAA") offered contractually to all employees to prove his point. He is factually mistaken. PAA's are not additional days off, as Cook appears to suggest to the Court. Instead, PAA days relate to a provision in the contract which entitles each employee 5 paid days per year to cover absences from work, regardless of whether those absences are excused or unexcused. A. 77-80. However, just because an employee uses a PAA to cover a missed day from work, there was no evidence this means the absence will be treated as excused for purposes of discipline or the attendance procedure. Under the chronic procedure, excused or unexcused absences count towards the 20% absence test regardless of whether the employee is paid for the day off, using a PAA day.

Saying Cook could have been accommodated by using his PAA days and then a floater to replace him when he was absent not only reargues the facts, but is a fruitless suggestion. With only 5 PAA days per year, Cook would

not be entitled to this benefit for very long. Moreover, this would allow Cook to be absent more times than allowed by the Chronic Absentee Procedure as well as entitling Cook to receive full benefits without working full time. In fact, Cook used up all his PAA days and his vacation time before his discharge. Unlike *Ansonia,* where only several extra days were involved, Cook required one day off per scheduled work week.

Likewise, Mr. Williams' experiences at Chrysler as a Sabbatarian are not relevant to this case. There are several reasons for this.

First, Cook specifically told the Union *not* to use Williams' case to assist him in getting off work. He asked the Union *not* to get Williams involved and to keep Williams out of the case entirely. SA 59-60.

Cook therefore took from the Union's arsenal a weapon he now uses to support his case. It indeed is ironic that Cook as an afterthought uses Williams to support his case now when he failed by his own choice to use Williams at a time when it could have done him the most good. It indeed is ironic that Cook later criticized the Union's representation efforts when he took a key precedent out of their hands.

Second, the circumstances under which Chrysler allowed Williams to be absent on Friday night are totally different from Cook's case. Williams worked in the Paint Department, not the Trim Department where Cook worked. In 1984 and 1985, absenteeism was not a problem because employees previously had been laid off for a long time and were working, and the Plant worked under a model contract where fewer classifications allowed for greater flexibility. SA 584-605, 608-609, 613. In 1984 and 1985, Paint had excess manpower. Williams' request was not a problem because they needed people to go home. SA 584-605.

The situation was far different in 1986. The 1985 labor contract increased the number of job classifications, thereby making the effect of absenteeism on operations

more significant. In an effort to reduce costs, Chrysler cut manpower on the rolls, thereby reducing available manpower. SA 608-609. Finally, the steady 6 day, 9 hour day schedule had taken its toll. By 1986, absenteeism had increased and become more of a problem. SA 586-588, 605-609. For the first time at Plant II, Chrysler also began to enforce the Uniform Attendance Procedure and administer it the way it was intended. SA 252.

Even more importantly, the local labor agreement which took effect in November 1985 changed how Chrysler granted time off to workers. Under the agreement, SA 586-588, 608-609, Chrysler no longer could decide who could get off a particular day. The Book Procedure specifically prevented any employee from repeatedly getting off one day a week and took away discretion from the Supervisors. SA 586-588, 252, 616 a-b, 640-641. As a result, Chrysler no longer could continuously allow Williams to be off on a day which others also wanted off.

After May 1986, Williams used the Book procedure and his seniority to remain employed and eventually hold first shift. He then was able to be accommodated within the confines of the labor agreements. Williams' case thus shows that a Seventh-Day Adventist can be accommodated at Chrysler within the confines of the contract. That also holds true for the two Adventists with seniority to hold first shift who are excused on Saturdays and were still employed.

Given these reasons, Williams' situation bears no relevance to this case and should be disregarded.

Finally, the Court should disregard Cook's attempt to equate Cook's absences with "secular" absences. Chrysler has found ways to deal with absenteeism because it is a problem it must deal with, not because it is accommodating people. Cook and any other workers may be absent up to a certain point, without penalty, then discipline is imposed.

Cook used his vacation just like everyone else. However, the other absences cited by Cook are for non-recurring problems and/or are negotiated. In contrast, excusing Cook amounted to a permanent Monday-Thursday, and Saturday work week with its attendant costs and adverse affects. This is a different work week and schedule than everyone else, based solely on religion. The two situations are totally different.

CONCLUSION

For all of the foregoing reasons, Cook's petition for certiorari should be denied.

Respectfully submitted,

PATRICIA L. COHEN
(Counsel of Record)
CHARLES M. POPLSTEIN
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

K. C. HORTOP
KIM KOLB
CHRYSLER CORPORATION
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-0176

Attorneys for Respondent
Chrysler Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JESSE L. COOK,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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REPLY BRIEF OF PETITIONER

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
Suite 201, 4545 42nd St., NW
Washington, DC 20016
(202) 363-1773

ROBERT W. NIXON
MITCHELL A. TYNER
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6320

MICHAEL J. HOARE
One Metropolitan Square
24th Floor
St. Louis, MO 63102
(314) 241-7961

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY BRIEF OF PETITIONER

INTRODUCTION

Contrary to Chrysler's assertion, this case is not unique to plaintiff Cook. Chrysler's objection to Cook's request for an accommodation is essentially the same as that raised by all unionized employers.[1] According to Chrysler:

> This case involves the application of the religious accommodation provision of Title VII to the

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[1] Defendant union was joined to permit full relief. The allegations of Title VII violation were directed at the employer Chrysler Corporation.

> highly structured production environment of a unionized employer whose labor agreement covers virtually every aspect of production, scheduling, and employment.

(Chrysler Brf. at 15) If such unionized employers are excused by *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), from Title VII's religious accommodation responsibility, then this Court has effectively nullified the congressional will. Cook believes that *Hardison* was not meant to be a constitutional repealer.

I. *HARDISON* HAS NOT SETTLED RELIGIOUS ACCOMMODATION LAW.

Chrysler's argument that *Hardison* has resolved the issues presented by section 2000e(j) of Title VII and that the courts have uniformly applied that statutory provision is simply incorrect. One commentator has noted that the ambiguity of the "undue hardship" standard "has produced substantial disagreement among the courts regarding the precise degree of hardship attaching to the employer's accommodation obligation under the Act." Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirements Since Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839, 841 (1985). The writer noted that "[t]he disagreement is often explained in both cases and commentary as a function of the varied factual contexts in which the accommodation issue arises . . . ." Although acknowledging that what constitutes reasonableness and undue hardship will vary under the circumstances of each case, the commentator concluded that "[t]he disagreement extends beyond this, . . . because courts do not approach the varied factual contexts with a consistent analytical framework." *Id.* at 841 n.19.

The writer concludes that "[o]f the two principal holdings of *Hardison*, only one has carried a clear message to the circuits: the dominance of seniority over religious ac-

commodation. Therefore, although lower courts may no longer require employers to make involuntary shift assignments or other accommodations that violate seniority practices, they remain free to interpret section 2000e(j)'s undue hardship standard to require an alternative mode of accommodation that does not threaten seniority." *Id.* at 847.

The writer flatly states that "far from resolving the lower courts' confusion as to the meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute." *Id.* at 847-48.[2]

II. CONTRARY TO CHRYSLER'S ASSERTION, THE DISTRICT COURT'S CONCLUSION OF LAW THAT ALL PROVISIONS OF A LABOR CONTRACT—NOT MERELY ITS SENIORITY PROVISO—ARE INVIOLATE TO A RELIGIOUS ACCOMMODATION CLAIM CLEARLY POISONED THE OUTCOME OF THIS LAWSUIT.

Chrysler attempts to defeat Cook's petition by claiming that the question of whether provisions of a labor agreement may be utilized by an employer as a shield to ward off an employee's religious accommodation request is irrelevant because the cost of accommodating Cook was more

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[2] One reviewer of *Hardison*, noting that the Supreme Court embarked on a fact-finding mission in deciding *Hardison*, stated that "[i]t is difficult, if not impossible, to cull from the opinion any law which will serve as precedent in other religious discrimination cases. The Court found that TWA had satisfied its affirmative duty to Hardison and little else. Thus, the reasonable accommodation standard, to the extent it existed in the past, was essentially emasculated by the majority opinion since, aside from the judicial mandate which preserves all valid collective bargaining agreements for the future, the decision is clearly limited to its particular facts." Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 Brooklyn L. Rev. 598, 620 (1978).

than *de minimis*. However, the trial court spoke not in the conjunctive (as Chrysler would have this Court believe) but rather in the disjunctive. The court did not list "[t]he other options that plaintiff . . . [claimed] should have been considered." *Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1023 (E.D. Mo. 1991); *see* p. 22a.[3] But instead, the court summarily disposed of those accommodation options as being *either* "violative of the collective bargaining agreement *or* [not and] would have caused undue hardship to Chrysler." *Id.* (emphasis supplied).

The district court based its "more than *de minimis* cost" finding specifically on only one of the available means of accommodation—that is excusing Cook from work for his full shift on Friday, thus resulting in a short workweek but still providing the full benefit package. The trial court quantified "[t]he costs of the benefit package lost because of [Cook] being absent 20% of the time at $1578 per year." *Id.* at 1021; *see* p. 16a.

The trial court also concluded that Chrysler was not able to accommodate Cook because of "Cook's seniority (or lack thereof) *and* the collective agreements." *Id.* at 1025; *see* p. 25a (emphasis supplied). Neither the court's holding about seniority nor about the collective bargaining agreements was based upon the extent of the cost of such an accommodation. Instead, the trial court concluded that the "maze of restrictions" contained in the labor agreements created a " 'violation wall.' " *Id.* at 1024; *see* p. 24 a.[4]

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[3] Reference to "____a" refers to the appendix to the Petition for Writ of Certiorari.

[4] Chrysler maintains that no accommodation can be provided for religious reasons when the identical accommodation is not made available for all other employees for secular concerns. (*See* Chrysler Brf. at 20.) The Eighth Circuit earlier in *Brown v. General Motors Corp.*, 601 F.2d 956, 962 (8th Cir. 1979), rejected this very argument stating that such an argument "[c]arried to its logical conclusion . . . would preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)."

Chrysler argues that "[e]xcusing Cook every Friday night . . . would violate the labor agreement, which calls for the discharge of an employee who is absent 20% or more of the time, whether excused or unexcused." (Chrysler Brf. at 17) There are several problems with this contention. Nothing in the chronic absentee procedure mandates termination. But assuming termination may result if the individual is absent from work 20% or more of the time, at no time would Cook be absent 20% of the time during the regular workweek as a result of missing work on Friday night. He would have to be absent every Friday during the year to fall under the condemnation of the chronic absentee program. Chrysler forgets that a number of Fridays are designated as holidays when the plant is closed. This is evidenced by the designated holidays in the collective bargaining agreement. (A 74) For instance, from November 29, 1985, to November 29, 1986, five holidays fell on Friday: November 29, 1985, March 28, 1986, July 4, 1986, and November 28, 1986. From November 29, 1986, to November 29, 1987, five holidays fell on Friday: December 26, 1986, January 2, 1987, April 17, 1987, July 3, 1987, and November 27, 1987. Cook and the rest of the factory also would not be scheduled to work 2 or 3 additional Fridays each year during the plant shut down at the time of the model change. (A 560)

Cook and the union suggested that plaintiff utilize his paid absence allowances ("PAAs") for a portion of his Friday night absences since each employee is entitled to take PAAs in segments as low as four hours at a time. It is conceivable that if Cook had been permitted to work until sundown on Friday, as Chrysler had for years permitted another Sabbatarian to do, ten of the remaining Friday night absences would have been excused.

Cook was willing to use his vacation time on Fridays, one day at a time. Management rejected this proposal claiming Chrysler does not permit employees to take partial weeks of vacation. (A 1069-72) According to Chrysler,

such an arrangement was not provided for in the collective bargaining agreement. (A 1075) But Chrysler management admitted that they had no idea whether the union would have agreed to a one day at a time vacation proposal. (A 1073-74)

Cook also came into work after sundown on Saturdays. He was willing to do this in the future at straight time to complete a 40 hour workweek. Thus, the district court's finding that the available accommodation would result in the payment of full benefits for less than a 5 day workweek is not supported by the record.

Another alternative would have completely eliminated Chrysler's so-called benefit hardship. Chrysler attempted to quantify the benefit package by spreading it over a five-day workweek. If Chrysler was able to quantify the portion of the benefit package that it felt Cook was not entitled to as a defense in this trial, it was equally able to come up with the figure prior to his discharge and do one of three things: 1) reduce Cook's pay accordingly; 2) require Cook to pay back the additional sum; or 3) make a pro rata reduction in Cook's benefits. But it is questionable that these alternatives were necessary in light of the other available accommodation alternatives.

An accommodation somewhat similar to this has been validated in the union dues cases where the employee, seeking on religious grounds to avoid the payment of union dues, has agreed to pay an equivalent sum to a non-religious, non-union charitable organization in lieu of the payment of union dues. Such an arrangement, though inconsistent with the collective bargaining agreement, has been validated by numerous courts of appeal as an appropriate means of providing a religious accommodation. *See Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), and *Nottelson v. A. O. Smith Corp.*, 643 F.2d 445, 451 (7th Cir. 1981).

III. ALTHOUGH THE EEOC GUIDELINES MAY NORMALLY BE ACCORDED LESS WEIGHT THAN ADMINISTRATIVE REGULATIONS, HERE SIGNIFICANT WEIGHT SHOULD BE ACCORDED THE POST-*HARDISON* GUIDELINES, AND THIS COURT SHOULD DECIDE WHETHER THE GUIDELINES ARE CONSISTENT WITH *HARDISON*.

Chrysler argues that the EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1, 1605.3, "cannot be squared with *Hardison*." (Chrysler Brf. at 25) Chrysler argues, contrary to the specific wording of the Guidelines, that no showing need be made as to the magnitude of the hardship or the relative cost to the employer.

Logic, however, is on the side of the EEOC Guidelines. Judge Pell of the Seventh Circuit, quoting Professor Kenneth P. Lopatka, stated:

> The major factors which enter into the decision of whether the hardship involved is "undue" are the size of the work force, *the type of shift scheduling involved in the employer's operation*, the skilled status of the religious employee, the existence of a pool of qualified replacements, *the risk of impairment in the performance of essential public services*, and the safety considerations involved in the reduced manning of crews or in *requiring employees to work successive shifts to substitute for the religious employee.* (Footnotes omitted.) (Emphasis added as to those matters particularly applicable here.)

Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80, 85 (7th Cir. 1979) (Pell, J., concurring) (emphasis in original), citing Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, U. Ill. L.F. 69, 108 (1977).

As the district court in *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973), pointed out, "[a]s the degree of business hardship increases, the

quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what . . . Chief Justice Burger was referring to as the 'business necessity' which would qualify as a legitimate reason for discharging an employee."

This Court's utilization of the "more than *de minimis* cost" test presupposes a quantification of the undue hardship involved in any accommodation. In fact, without such quantification, the trial court simply cannot properly determine when the cost of an accommodation results in undue hardship. Without quantifying the cost, how can a trial court, for instance, determine whether the cost from "lost efficiency" is more than *de minimis*? How will a reviewing court conclude that the trial court was correct in its finding without quantification?

Chrysler's attack on the EEOC Guidelines ignores one of the prime reasons for the 1972 congressional insertion of the religious accommodation provision in Title VII. As the Fifth Circuit explained in *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F.2d 163, 168 n.9 (5th Cir. 1976), 42 U.S.C. § 2000e(j) was to provide the statutory basis for EEOC to formulate guidelines in the future. Appendix 2, section 1605.2 and 1605.3 of the EEOC Guidelines noted that the Guidelines was adopted after this Court's decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), following hearings and finding that "there is widespread confusion concerning the extent of accommodation under the *Hardison* decision." 45 Fed. Reg. 72615 (1980).

It makes no sense to empower EEOC to issue guidance to employers and employees if no reliance can be placed on that guidance. Further, the resulting confusion can only lead to more litigation. If EEOC guidance as to the meaning of "*de minimis* cost" means nothing and is inconsistent with *Hardison*, there is no better time for employers, em-

ployees, and, yes, EEOC to be told. This Court is the appropriate tribunal to make such a determination.

IV. THE OTHER SABBATARIAN AT CHRYSLER WAS ACCOMMODATED AT THE SAME TIME COOK WAS BEING DENIED ACCOMMODATION.

Counter to Chrysler's assertion, Roger Williams, the other Sabbatarian working concurrently at Chrysler with Cook, did not satisfy his post-May, 1986, Friday night scheduling conflicts only by use of the book procedure. After May 8, 1986, when Williams' paid absence allowances (PAAs) were exhausted, his foreman permitted him to leave work early at sunset without penalizing him. (A 299-300)

During the same time, Cook was told that if he left work early on Friday night he would be treated as a voluntary "quit." (A 449, 610, 614-15) In addition, Williams was assigned the position of a floater because in that position it was easier for management to permit Williams to leave on Friday night. (A 302, 399-400) The same consideration was not given to Cook.

CONCLUSION

For the above-stated reasons and for the reasons stated in plaintiff's Petition, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
Suite 201, 4545 42nd St., NW
Washington, DC 20016
(202) 363-1773

ROBERT W. NIXON
MITCHELL A. TYNER
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6320

MICHAEL J. HOARE
One Metropolitan Square
24th Floor
St. Louis, MO 63102
(314) 241-7961

Counsel for Petitioner